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HOUSE OF REPRESENTATIVES
REPT. 101-485
Part 2

AMERICANS WITH DISABILITIES ACT OF 1990

MAY 15, 1990.—Ordered to be printed

Mr. HAWKINS, from the Committee on Education and Labor, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany H.R. 2273 which on May 9, 1989, was referred jointly to the Committee on Education and Labor, the Committee on Energy and Commerce, the Committee on Public Works and Transportation, and the Committee on the Judiciary]

[Including cost estimate of the Congressional Budget Office]

The Committee on Education and Labor, to whom was referred the bill (H.R. 2273) to establish a clear and comprehensive prohibition of discrimination on the basis of disability, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Americans with Disabilities Act of 1989".

(b) TABLE OF CONTENTS.—The table of contents is as follows:

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal

basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) PURPOSE.—It is the purpose of this Act—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including its power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

SEC. 3. DEFINITIONS.

As used in this Act:

(1) AUXILIARY AIDS AND SERVICES.—The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) DISABILITY.—The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) STATE.—The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

TITLE I—EMPLOYMENT

SEC. 101. DEFINITIONS.

As used in this title:

(1) COMMISSION.—The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–4).

(2) COVERED ENTITY.—The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) EMPLOYEE.—The term "employee" means an individual employed by an employer.

(4) EMPLOYER.—

(A) The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) EXCEPTIONS.—The term "employer" does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(5) ILLEGAL DRUG.—The term "illegal drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. The term "illegal drug" does not mean the use of a controlled substance

taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(6) PERSON, ETC.—The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(7) QUALIFIED INDIVIDUAL WITH A DISABILITY.—The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

(8) REASONABLE ACCOMMODATION.—The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(9) UNDUE HARDSHIP.—

(A) IN GENERAL.—The term "undue hardship" means an action requiring significant difficulty or expense.

(B) DETERMINATION.—In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; the overall financial resources of the entity and the financial resources of its facility or facilities involved in the provision of the reasonable accommodation;

(ii) the type of operation or operations of the covered entity, including the composition and structure of the workforce, in terms of such factors as functions of the workforce, geographic separateness, and administrative relationship, to the extent that such factors contribute to a reasonable determination of undue hardship; and

(iii) the nature and cost of the accommodation needed under this Act.

SEC. 102. DISCRIMINATION.

(a) GENERAL RULE.—No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) CONSTRUCTION.—As used in subsection (a), the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5) REASONABLE ACCOMMODATION.—

(a) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(b) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) MEDICAL EXAMINATIONS AND INQUIRIES.—

(1) IN GENERAL.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) PREEMPLOYMENT.—

(A) PROHIBITED EXAMINATION OR INQUIRY.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant or employee as to whether such applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(B) ACCEPTABLE INQUIRY.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) EMPLOYMENT ENTRANCE EXAMINATION.—A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such physical examination are used only in accordance with this title.

(4) EXAMINATION AND INQUIRY.—

(A) PROHIBITED EXAMINATIONS AND INQUIRIES.—A covered entity shall not conduct or require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) ACCEPTABLE INQUIRIES.—A covered entity may make inquiries into the ability of an employee to perform job-related functions.

SEC. 103. DEFENSES.

(a) IN GENERAL.—It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

(b) QUALIFICATION STANDARDS.—The term "qualification standards" may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace.

(c) RELIGIOUS ENTITIES.—

(1) IN GENERAL.—This title shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

(2) QUALIFICATION STANDARD.—Under this title, a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization.

SEC. 104. ILLEGAL DRUGS AND ALCOHOL.

(a) QUALIFIED INDIVIDUAL WITH A DISABILITY.—For purposes of this title, the term "qualified individual with a disability" shall not include any employee or applicant who is a current user of illegal drugs, when the covered entity acts on the basis of such use.

(b) Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs, or (iii) is erroneously regarded as being an illegal drug user but is not using illegal drugs. Provided that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer using illegal drugs.

(c) AUTHORITY OF COVERED ENTITY.—A covered entity—

(1) may prohibit the use of alcohol or illegal drugs at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or illegal drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace of 1988 (41 U.S.C. 701 et seq.);

(4) may hold an employee who is a drug user or alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free workplace regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use, to comply with the standards established by such regulations.

(d) DRUG TESTING.—

(1) IN GENERAL.—For purposes of this title, a test to determine the use of illegal drugs shall not be considered a medical examination.

(2) CONSTRUCTION.—Nothing in this title shall be construed to encourage, prohibit, or authorize the conducting of drug testing for illegal drugs of job applicants or employees or making employment decisions based on such test results.

SEC. 105. POSTING NOTICES.

Every employer, employment agency, labor organization, or joint labor-management committee covered under this title shall post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-10).

SEC. 106. REGULATIONS.

Not later than 1 year after the date of enactment of this Act, the Commission shall issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

SEC. 107. ENFORCEMENT.

(a) The remedies and procedures set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5, 2000e-6, 2000e-8, and 2000e-9) shall be available, with respect to the Commission, the Attorney General, or any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 106, concerning employment.

(b) The agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall devel-

op procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this title and the Rehabilitation Act of 1973. Such agencies shall establish such coordinating mechanisms in the regulations implementing this title and the Rehabilitation Act of 1973.

SEC. 108. EFFECTIVE DATE.

This title shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

SEC. 201. DEFINITION.

As used in this title, the term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a department, agency, special purpose district, or other instrumentality of a State or a local government.

SEC. 202. DISCRIMINATION.

No qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or a local government.

SEC. 203. ACTIONS APPLICABLE TO PUBLIC TRANSPORTATION PROVIDED BY PUBLIC ENTITIES CONSIDERED DISCRIMINATORY.

(a) DEFINITION.—As used in this title, the term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(b) VEHICLES.—

(1) NEW BUSES, RAIL VEHICLES, AND OTHER FIXED ROUTE VEHICLES.—It shall be considered discrimination for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) for a public entity to purchase or lease a new fixed route bus of any size, a new intercity rail vehicle, a new commuter rail vehicle, a new rapid rail vehicle, a new light rail vehicle to be used for public transportation, or any other new fixed route vehicle to be used for public transportation and for which a solicitation is made later than 30 days after the date of enactment of this Act, if such bus, rail, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) USED VEHICLES.—If a public entity purchases or leases a used vehicle to be used for public transportation after the date of enactment of this Act, such individual or entity shall make demonstrated good faith efforts to purchase or lease such a used vehicle that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(3) REMANUFACTURED VEHICLES.—If a public entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle to be used for public transportation, so as to extend its usable life for 5 years or more, the vehicle shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) PARATRANSIT AS A SUPPLEMENT TO FIXED ROUTE PUBLIC TRANSPORTATION SYSTEM.—

(1) IN GENERAL.—If a public entity operates a fixed route public transportation system to provide public transportation, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public transit entity that is responsible for providing public transportation to fail to provide paratransit or other special transportation services sufficient to provide a comparable level of services as is provided to individuals using fixed route public transportation to individuals with disabilities, including individuals who use wheelchairs, who cannot otherwise use fixed route public transportation and to other individuals associated with such individuals with disabilities in accordance with service criteria established under regulations promulgated by the Secretary of Transportation unless the public

transit entity can demonstrate that the provision of paratransit or other special transportation services would impose an undue financial burden on the public transit entity.

(2) UNDUE FINANCIAL BURDEN.—If the provision of comparable paratransit or other special transportation services would impose an undue financial burden on the public transit entity, such entity must provide paratransit and other special transportation services to the extent that providing such services would not impose an undue financial burden on such entity.

(3) REGULATIONS.—

(A) FORMULA.—Regulations promulgated by the Secretary of Transportation to determine what constitutes an undue financial burden, for purposes of this subsection, may include a flexible numerical formula that incorporates appropriate local characteristics such as population.

(B) ADDITIONAL PARATRANSIT SERVICES.—Notwithstanding paragraphs (1) and (2), the Secretary may require, at the discretion of the Secretary, a public transit authority to provide paratransit services beyond the amount determined by such formula.

(d) COMMUNITY OPERATING DEMAND RESPONSIVE SYSTEMS FOR THE GENERAL PUBLIC.—If a public entity operates a demand responsive system that is used to provide public transportation for the general public, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to purchase or lease a new vehicle, for which a solicitation is made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to the general public.

(e) TEMPORARY RELIEF WHERE LIFTS ARE UNAVAILABLE.—With respect to the purchase of new buses, a public entity may apply for, and the Secretary of Transportation may temporarily relieve such public entity from the obligation to purchase new buses of any size that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(f) CONSTRUCTION.—

(1) IN GENERAL.—Any relief granted under subsection (e) shall be limited in duration by a specified date and the appropriate committees of the Congress shall be notified of any such relief granted.

(2) FRAUDULENT APPLICATION.—If, at any time, the Secretary of Transportation has reasonable cause to believe that such relief was fraudulently applied for, the Secretary of Transportation shall—

(A) cancel such relief, if such relief is still in effect; and

(B) take other steps that the Secretary of Transportation considers appropriate.

(g) NEW FACILITIES.—For purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to build a new facility that will be used to provide public transportation services, including bus service, intercity rail service, rapid rail service, commuter rail service, light rail service, and other service used for public transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(h) ALTERATIONS OF EXISTING FACILITIES.—With respect to a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and

usable by individuals with disabilities, including individuals who use wheelchairs. If such public entity is undertaking major structural alterations that affect or could affect the usability of the facility (as defined under criteria established by the Secretary of Transportation), such public entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving such area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(i) EXISTING FACILITIES, INTERCITY RAIL, RAPID RAIL, LIGHT RAIL, AND COMMUTER RAIL SYSTEMS, AND KEY STATIONS.—

(1) EXISTING FACILITIES.—Except as provided in paragraph (3), with respect to existing facilities used for public transportation, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to fail to operate such public transportation program or activity conducted in such facilities so that, when viewed in the entirety, it is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) INTERCITY, RAPID, LIGHT, AND COMMUTER RAIL SYSTEMS.—With respect to vehicles operated by intercity, light, rapid, and commuter rail systems, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to have at least one car per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in any event in no less than 5 years.

(3) KEY STATIONS.—

(A) IN GENERAL.—For purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to make stations in intercity rail systems and key stations in rapid rail, commuter rail, and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(B) RAPID RAIL, COMMUTER RAIL, AND LIGHT RAIL SYSTEMS.—Key stations in rapid rail, commuter rail, and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

(C) INTERCITY RAIL SYSTEMS.—All stations in intercity rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after the date of enactment of this Act.

(D) PLANS AND MILESTONES.—The Secretary of Transportation shall require the appropriate public entity to develop a plan for compliance with this paragraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this paragraph.

SEC. 204. REGULATIONS.

(a) ATTORNEY GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this title (other than section 203), and such regulations shall be consistent with this title and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) except, with respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794).

(b) SECRETARY OF TRANSPORTATION.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations in an accessible format that include standards applicable to facilities and vehicles covered under section 203 of this title.

(2) CONFORMANCE OF STANDARDS.—Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

SEC. 205. ENFORCEMENT.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of this Act, or regulations promulgated under section 204, concerning public services.

SEC. 206. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this title shall become effective 18 months after the date of enactment of this Act.

(b) FIXED ROUTE VEHICLES.—Section 203(b)(1), as regarding new fixed route vehicles, shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

SEC. 301. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The term "commerce" means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) COMMERCIAL FACILITIES.—The term "commercial facilities" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) PUBLIC ACCOMMODATION.—The following privately operated entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other similar place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, or lecture hall;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other similar retail sales establishment;

(F) a laundromat, dry-cleaners, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other similar service establishment;

(G) a terminal used for public transportation;

(H) a museum, library, gallery, and other similar place of public display or collection;

(I) a park or zoo;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption program, or other similar social service center; and

(L) a gymnasium, health spa, bowling alley, golf course, or other similar place of exercise or recreation.

(4) PUBLIC TRANSPORTATION.—The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(5) READILY ACHIEVABLE.—

(A) IN GENERAL.—The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense.

(B) DETERMINATION.—In determining whether an action is readily achievable, factors to be considered include—

(i) the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; the overall financial resources of the entity and the financial resources of its facility or facilities involved in the removal of the barrier;

(ii) the type of operation or operations maintained by a covered entity, including the composition and structure of the workforce, in terms of such factors as functions of the workforce, geographic separateness, and administrative relationship to the extent that such factors contribute to a reasonable determination of readily achievable; and

(iii) the nature and cost of the action needed.

SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

(b) CONSTRUCTION.—

(1) GENERAL PROHIBITION.—

(A) ACTIVITIES.—

(i) DENIAL OF PARTICIPATION.—It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of an entity.

(ii) PARTICIPATION IN UNEQUAL BENEFIT.—It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, and accommodation that is not equal to that afforded to other individuals.

(iii) SEPARATE BENEFIT.—It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) For purposes of sec. 302(b)(1)(A)(i)–(iii), the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) INTEGRATED SETTINGS.—Goods, facilities, privileges, advantages, accommodations, and services shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) OPPORTUNITY TO PARTICIPATE.—Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) ADMINISTRATIVE METHODS.—An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) ASSOCIATION.—It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, and accommodations, or other opportunities to an individual or entity because of the known dis-

ability of an individual with whom the individual or entity is known to have a relationship or association.

(2) SPECIFIC PROHIBITIONS.—

(A) DISCRIMINATION.—As used in subsection (a), the term "discrimination" shall include—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, and accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, and accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable;

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable;

(vi) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, and where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General), except that this paragraph shall not be construed to require the installation of an elevator for facilities that are less than three stories or that have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

(B) FIXED ROUTE SYSTEM.—

(i) ACCESSIBILITY.—It shall be considered discrimination for an entity that uses a vehicle for a fixed route system to transport individuals not covered under section 203 or 304, to purchase or lease a bus or a vehicle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with dis-

abilities (including individuals who use wheelchairs), except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

(ii) EQUIVALENT SERVICE.—If such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title that is not readily accessible to or usable by individuals with disabilities, it shall be discriminatory for such entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public.

(C) DEMAND RESPONSIVE SYSTEM.—As used in subsection (a), the term "discrimination" shall include, in the case of a covered entity that uses vehicles in a demand responsive system to transport individuals not covered under section 203 or 304, an incident in which—

(i) such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title, a failure to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public; and

(ii) such entity purchases or leases a bus or a vehicle that can carry in excess of 16 passengers for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public, except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

SEC. 303. NEW CONSTRUCTION IN PUBLIC ACCOMMODATIONS AND COMMERCIAL FACILITIES.

(a) APPLICATION OF TERM.—Except as provided in subsection (b), as applied to a—

(1) public accommodation; and

(2) commercial facilities;

the term "discrimination" as used in section 302(a) shall mean a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title.

(b) ELEVATOR.—Subsection (a) shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

SEC. 304. PROHIBITION OF DISCRIMINATION IN PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal business of providing air transportation, and whose operations affect commerce.

(b) CONSTRUCTION.—As used in subsection (a), the term "discrimination against" includes—

(1) the imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;

(2) the failure of an entity to—

(A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

(C) remove barriers consistent with the requirements of section 302(b)(2)(A) (iv), (v), and (vi);

(3) the purchase or lease of a new vehicle (other than an automobile or an over-the-road bus) that is to be used to provide public transportation services, and for which a solicitation is made later than 30 days after the date of enact-

ment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs (except in the case of a vehicle used in a demand response system, in which case the new vehicle need not be readily accessible to and usable by individuals with disabilities if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public); and

(4) the purchase or lease of a new over-the-road bus that is used to provide public transportation services and for which a solicitation is made later than 7 years after the date of enactment of this Act for small providers (as defined by the Secretary of Transportation) and 6 years for other providers, except as provided in section 305(d), that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

SEC. 305. STUDY.

(a) PURPOSE.—The Office of Technology Assessment shall undertake a study to determine—

(1) the access needs of individuals with disabilities to over-the-road buses; and

(2) the most cost effective methods for making over-the-road buses readily accessible to and usable by individuals with disabilities, particularly individuals who use wheelchairs.

(b) CONTENT.—The study shall analyze issues, including—

(1) the anticipated demand by individuals with disabilities for accessible over-the-road buses;

(2) the degree to which over-the road buses are readily accessible to and usable by individuals with disabilities;

(3) the cost of providing accessibility to over-the-road buses to individuals with disabilities, including recent technological and cost saving developments in equipment and devices providing such accessibility;

(4) possible design changes in over-the-road buses that could enhance such accessibility; and

(5) the impact of accessibility requirements on the continuation of inter-city bus service by over-the-road buses, with particular consideration of impact on rural service.

(c) ADVISORY COMMITTEE.—In conducting the study required by subsection (a), the Office of Technology Assessment shall establish an advisory committee, which shall consist of—

(1) members selected from among private operators using over-the-road buses, bus manufacturers, and lift manufacturers;

(2) members selected from among individuals with disabilities, particularly individuals who use wheelchairs, who are potential riders of such buses; and

(3) members selected for their technical expertise on issues included in the study.

The number of members selected under each of paragraphs (1) and (2) shall be equal, and the total number of members selected under paragraphs (1) and (2) shall exceed the number of members selected under paragraph (3).

(d) DEADLINE.—The study required by subsection (a), along with recommendations by the Office of Technology Assessment, including any policy options for legislative action, shall be submitted to the President and the Congress within 36 months after the date of enactment of this Act. If the President, after reviewing the study, determines that compliance with the requirements of section 304(a) on or before the applicable deadlines specified in section 304(b)(4) will result in a significant reduction in intercity bus service, each such deadline shall be extended by one additional year.

(e) REVIEW.—In developing the study required by subsection (a), the Office of Technology Assessment shall provide a preliminary draft of such study to the Architectural and Transportation Barriers Compliance Board established under section 502 of the Rehabilitation Act of 1973 (29 U.S.C. 792). The Board shall have an opportunity to comment on such draft study, and any such comments by the Board made in writing within 120 days after the Board's receipt of the draft study shall be incorporated as part of the final study required to be submitted under subsection (d).

SEC. 306. REGULATIONS.

(a) ACCESSIBILITY STANDARDS.—Not later than 1 year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format that shall include standards applicable to facilities and vehicles covered under section 302(b)(2) (B) and (C) and section 304.

(b) OTHER PROVISIONS.—Not later than 1 year after the date of enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry

out the remaining provisions of this title not referred to in subsection (a) that include standards applicable to facilities and vehicles covered under section 302.

(c) STANDARDS.—Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

(d) INTERIM ACCESSIBILITY STANDARDS.—Prior to the issuance of final regulations under this section, compliance with the current Uniform Federal Accessibility Standards shall suffice to satisfy the requirements that facilities be readily accessible to and usable by persons with disabilities as required under sections 302(b)(2)(A)(vi) and 303, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 306(a), compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

SEC. 307. EXEMPTIONS FOR PRIVATE CLUBS AND RELIGIOUS ORGANIZATIONS.

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 (42 U.S.C. 2000-a(e)) or to religious organizations or entities controlled by religious organizations, including places of worship.

SEC. 308. ENFORCEMENT.

(a) IN GENERAL.—

(1) AVAILABILITY OF REMEDIES AND PROCEDURES.—The remedies and procedures set forth in section 204 of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000a-3(a)) shall be available to any individual who is being or has reasonable grounds for believing that he or she is about to be subjected to discrimination on the basis of disability in violation of this title.

(2) INJUNCTIVE RELIEF.—In the case of violations of section 302(b)(2)(A)(iv) and (vi) and section 303(a), injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this title. Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

(b) ENFORCEMENT BY THE ATTORNEY GENERAL.—

(1) DENIAL OF RIGHTS.—

(A) DUTY TO INVESTIGATE.—

(i) IN GENERAL.—The Attorney General shall investigate alleged violations of this title, which shall include undertaking periodic reviews of compliance of covered entities under this title.

(ii) ATTORNEY GENERAL CERTIFICATION.—On the application of a state or local government, the Attorney General may, in consultation with the Architectural and Transportation Barriers Compliance Board, and after prior notice and a public hearing at which individuals with disabilities are provided an opportunity to testify against such certification, certify that a state law or local building code or similar ordinance that establishes accessibility requirements meets or exceeds the minimum requirements of the Act for the accessibility and usability of covered facilities under this title. At any enforcement proceeding under this section, such certification by the Attorney General shall be rebuttable evidence that such state law or local ordinance does meet or exceed the minimum requirements of the Act.

(B) POTENTIAL VIOLATION.—If the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by this title or that any person or group of persons has been denied any of the rights granted by such title, and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

(2) AUTHORITY OF COURT.—In a civil action under paragraph (1), the court—

(A) may grant any equitable relief that such court considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by this title;

(B) may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved when requested by the Attorney General; and

(C) may, to vindicate the public interest, assess a civil penalty against the entity in an amount—

(i) not exceeding $50,000 for a first violation; and

(ii) not exceeding $100,000 for any subsequent violation.

(3) In counting the number of previous determinations of violations for purposes of determining whether a "first" or "subsequent" violation has occurred, determinations in the same trial on liability that the covered entity has engaged in more than one discriminatory act are to be counted as a single violation.

(4) PUNITIVE DAMAGES.—For purposes of subsection (b)(2)(B), the term "monetary damages" and "such other relief" does not include punitive damages.

(5) JUDICIAL CONSIDERATION.—In a civil action under paragraph (1), the court, when considering what amount of civil penalty, if any, is appropriate, shall give consideration to any good faith effort or attempt to comply with this Act by the entity. In evaluating good faith, the court shall consider, among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability.

SEC. 309. EFFECTIVE DATE.

This title shall become effective 18 months after the date of enactment of this Act.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

SEC. 401. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

(a) TELECOMMUNICATIONS.—Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end thereof the following new section:

"SEC. 225. TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS.

"(a) DEFINITIONS.—As used in this section—

"(1) COMMON CARRIER OR CARRIER.—The term 'common carrier' or 'carrier' includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h), any common carrier engaged in intrastate communication by wire or radio, and any common carrier engaged in both interstate and intrastate communication, notwithstanding sections 2(b) and 221(b).

"(2) TDD.—The term 'TDD' means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

"(3) TELECOMMUNICATIONS RELAY SERVICES.—The term 'telecommunications relay services' means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses a TDD or other nonvoice terminal device and an individual who does not use such a device.

"(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES.—

"(1) IN GENERAL.—In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

"(2) REMEDIES.—For purposes of this section, the same remedies, procedures, rights, and obligations under this Act that are applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication by wire or radio and common carriers engaged in both interstate and intrastate communication by wire or radio.

"(c) PROVISION OF SERVICES.—Each common carrier providing telephone voice transmission services shall provide telecommunications relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment of this section.

"(d) REGULATIONS.—

"(1) IN GENERAL.—The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that—

"(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

"(B) establish minimum standards that shall be met by common carriers in carrying out subsection (c);

"(C) require that telecommunications relay services operate every day for 24 hours per day;

"(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

"(E) prohibit relay operators from refusing calls or limiting the length of calls that use telecommunications relay services;

"(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

"(G) prohibit relay operators from intentionally altering a relayed conversation.

"(2) TECHNOLOGY.—The Commission shall ensure that regulations prescribed to implement this section encourage the use of existing technology and do not discourage or impair the development of improved technology.

"(3) JURISDICTIONAL SEPARATION OF COSTS.—

"(A) IN GENERAL.—The Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

"(B) RECOVERING COSTS.—Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from the interstate jurisdiction and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.

"(C) JOINT PROVISION OF SERVICES.—To the extent interstate and intrastate common carriers jointly provide telecommunications relay services, the procedures established in section 410 shall be followed, as applicable.

"(4) FIXED MONTHLY CHARGE.—The Commission shall not permit carriers to impose a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunication relay services.

"(5) UNDUE BURDEN.—If the Commission finds that full compliance with the requirements of this section would unduly burden one or more common carriers, the Commission may extend the date for full compliance by such carrier for a period not to exceed 1 additional year.

"(e) ENFORCEMENT.—

"(1) IN GENERAL.—Subject to subsections (f) and (g), the Commission shall enforce this section.

"(2) COMPLAINT.—The Commission shall resolve, by final order, a complaint alleging a violation of this section within 180 days after the date such complaint is filed.

"(f) CERTIFICATION.—

"(1) STATE DOCUMENTATION.—Each State may submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services.

"(2) REQUIREMENTS FOR CERTIFICATION.—After review of such documentation, the Commission shall certify the State program if the Commission determines that the program makes available to hearing-impaired and speech-impaired individuals either directly, through designees, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets the requirements of regulations prescribed by the Commission under subsection (d).

"(3) METHOD OF FUNDING.—Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

"(4) SUSPENSION OR REVOCATION OF CERTIFICATION.—The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted.

"(g) COMPLAINT.—

"(1) REFERRAL OF COMPLAINT.—If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

"(2) JURISDICTION OF COMMISSION.—After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

"(A) final action under such State program has not been taken on such complaint by such State—

"(i) within 180 days after the complaint is filed with such State; or

"(ii) within a shorter period as prescribed by the regulations of such State; or

"(B) the Commission determines that such State program is no longer qualified for certification under subsection (f)."

(b) CONFORMING AMENDMENTS.—The Communications Act of 1934 (47 U.S.C. 151 et seq.) is amended—

(1) in section 2(b) (47 U.S.C. 152(b)), by striking "section 223 or 224" and inserting "sections 223, 224, and 225"; and

(2) in section 221(b) (47 U.S.C. 221(b)), by striking "section 301" and inserting "sections 225 and 301"

TITLE V—MISCELLANEOUS PROVISIONS

SEC. 501. CONSTRUCTION.

(a) REHABILITATION ACT OF 1973.—Nothing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) OTHER LAWS.—Nothing in this Act shall be construed to invalidate or limit any other Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act.

(c) INSURANCE.—Titles I through IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance:

Provided, That paragraphs (1), (2), and (3) are not used as a subterfuge to evade the purposes of title I and III.

SEC. 502. PROHIBITION AGAINST RETALIATION AND COERCION.

(a) RETALIATION.—No individual shall discriminate against any other individual because such other individual has opposed any act or practice made unlawful by this Act or because such other individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

(b) INTERFERENCE, COERCION, OR INTIMIDATION.—It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this Act.

(c) REMEDIES AND PROCEDURES.—The remedies and procedures available under sections 107, 205, and 308 of this Act shall be available to aggrieved persons for violations of subsections (a) and (b).

SEC. 503. STATE IMMUNITY.

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal court for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

SEC. 504. REGULATIONS BY THE ARCHITECTURAL AND TRANSPORTATION BARRIERS COMPLIANCE BOARD.

(a) ISSUANCE OF GUIDELINES.—Not later than 6 months after the date of enactment of this Act, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III.

(b) CONTENTS OF GUIDELINES.—The guidelines issued under subsection (a) shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) QUALIFIED HISTORIC PROPERTIES.—(i) The guidelines issued under subsection (a) shall include guidelines and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in the Uniform Federal Accessibility Standards 4. 1. 7(1)(a).

(ii) Regarding alterations of buildings or facilities that are covered by the requirements of Section 106 of the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 and 36 CFR Part 800, the guidelines issued under paragraph (i) shall, at a minimum, maintain the procedures and standards established in the Uniform Federal Accessibility Standards 4. 1. 7(1) and (2).

(iii) Regarding alterations of qualified historic buildings designated as historic under a statute of the appropriate state or local government body, the guidelines issued under paragraph (i) shall establish procedures equivalent to those established by the Uniform Federal Accessibility Standards 4. 1. 7(1)(b) and (c), and shall require, at a minimum, compliance with the minimum requirements established in Uniform Federal Accessibility Standards 4. 1. 7(2).

SEC. 505. ATTORNEY'S FEES.

In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

SEC. 506. TECHNICAL ASSISTANCE.

(a) PLAN FOR ASSISTANCE.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Chairman of the Equal Employment Opportunity Commission, the Secretary of Transportation, the National Council on Disability, the Chairperson of the Architectural and Transportation Barriers Compliance Board, and the Chairman of Federal Communications Commission, shall develop a plan to assist entities covered under this Act, along with other executive agencies and commissions, in understanding the responsibility of such entities, agencies, and commissions under this Act.

(2) PUBLICATION OF PLAN.—The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with the Administrative Procedure Act (5 U.S.C. 551 et seq.).

(b) AGENCY AND PUBLIC ASSISTANCE.—The Attorney General is authorized to obtain the assistance of other Federal agencies in carrying out subsection (a), including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) IMPLEMENTATION.—

(1) AUTHORITY TO CONTRACT.—Each department or agency that has responsibility for implementing this Act may render technical assistance to individuals and institutions that have rights or responsibilities under this Act.

(2) IMPLEMENTATION OF TITLES.—

(A) TITLE I.—The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance, as described in subsection (a), for title I.

(B) TITLE II.—

(i) IN GENERAL.—Except as provided for in clause (ii), the Attorney General shall implement such plan for assistance for title II.

(ii) EXCEPTION.—The Secretary of Transportation shall implement such plan for assistance for section 203.

(C) TITLE III.—The Attorney General, in coordination with the Secretary of Transportation and the Chairperson of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for title III.

(D) TITLE IV.—The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) TECHNICAL ASSISTANCE MANUALS.—Each department or agency as part of its implementation responsibilities, shall ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or responsibilities under this Act, no later than six months after applicable final regulations are published for titles I, II, III, and IV of this Act.

(d) GRANTS AND CONTRACTS.—

(1) IN GENERAL.—Each department and agency having responsibility for implementing this Act may make grants or enter into contracts with individuals, profit institutions, and nonprofit institutions, including educational institutions and groups or associations representing individuals who have rights or duties under this Act, to effectuate the purposes of this Act.

(2) DISSEMINATION OF INFORMATION.—Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this Act and to provide information and technical assistance about techniques for effective compliance with this Act.

(e) FAILURE TO RECEIVE ASSISTANCE.—An employer, public accommodation, or other entity covered under this Act shall not be excused from meeting the requirements of this Act because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

SEC. 507. FEDERAL WILDERNESS AREAS.

(a) STUDY.—The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 et seq.).

(b) SUBMISSION OF REPORT.—Not later than 1 year after the enactment of this Act, the National Council on Disability shall submit the report required under subsection (a) to Congress.

SEC. 508. TRANSVESTITES.

For the purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

SEC. 509. CONGRESSIONAL INCLUSION.

(a) IN GENERAL.—Notwithstanding any other provision of this Act or of law, the provisions of this Act shall, subject to subsection (b), apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof.

(b) HOUSE EMPLOYEES.—

(1) IN GENERAL.—The rights and protections under this Act shall apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(2) ADMINISTRATION.—In the administration of this subsection, the remedies and procedures under the Fair Employment Practices Resolution shall be applied. As used in this paragraph, the term "Fair Employment Practices Resolution" means House Resolution 558, One Hundredth Congress, agreed to October 4, 1988, as continued in effect by House Resolution 15, One Hundred First Congress, agreed to January 3, 1989.

SEC. 510. ILLEGAL DRUG USE.

(a) For purposes of this Act, an individual with a disability does not include an individual who is a current user of illegal drugs, when the covered entity acts on the basis of such use.

(b) Nothing in subsection (a) shall be construed to exclude as an individual with a disability an individual who (i) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been reha-

bilitated successfully and is no longer using illegal drugs, or (ii) is participating in a supervised rehabilitation program and is no longer using illegal drugs, or (iii) is erroneously regarded as being an illegal drug user but is not using illegal drugs. Provided that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual defined in this paragraph is no longer using illegal drugs.

(c) Notwithstanding subsection (a) and section 511(d), an individual shall not be denied health or social services on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

SEC. 511. DEFINITIONS.

Under this Act, the term "disability" does not include—

(a) homosexuality or bisexuality;

(b) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments or other sexual behavior disorders;

(c) compulsive gambling, kleptomania, or pyromania; or

(d) psychoactive substance use disorders resulting from current use of illegal drugs.

SEC. 512. AMENDMENTS TO THE REHABILITATION ACT.

(a) DEFINITION OF HANDICAPPED INDIVIDUAL.—Section 7(8) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)) is amended by redesignating subparagraph (C) as subparagraph (D), and by inserting after subparagraph (B) the following subparagraph:

"(C)(i) For purposes of title V, the term 'individual with handicaps' does not include an individual who is a current user of illegal drugs, when a recipient acts on the basis of such use.

"(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—

"(I) has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs;

"(II) is participating in a supervised rehabilitation program and is no longer using illegal drugs; or

"(III) is erroneously regarded as being an illegal drug user but is not using illegal drugs;

except that it shall not be a violation of this Act for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual with handicaps is no longer using illegal drugs.

"(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under titles I, II and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

"(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently uses illegal drugs or alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

"(v) For purposes of sections 503 and 504 as such sections relate to employment, the term 'individual with handicaps' does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.".

(b) DEFINITION OF ILLEGAL DRUGS.—Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 706) is amended by adding at the end the following new paragraph:

"(22) The term 'illegal drugs' means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. Such term does not mean the use of a controlled substance taken under supervision by a licensed health professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.".

(c) CONFORMING AMENDMENTS.—Section 7(8)(B) of the Rehabilitation Act of 1973 (29 U.S.C. 706(8)(B)) is amended—

(1) in the first sentence, by striking "Subject to the second sentence of this subparagraph," and inserting "Subject to subparagraphs (C) and (D),"; and

(2) by striking the second sentence.

SEC. 513. SEVERABILITY.

Should any provision in this Act be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and such action shall not affect the enforceability of the remaining provisions of the Act.

I. INTRODUCTION

On November 14, 1989, the Committee on Education and Labor, by a vote of 35–0, ordered favorably reported H.R. 2273, the Americans with Disabilities Act of 1989 (the ADA), with an amendment in the nature of a substitute.

The bill is sponsored by former Congressman Tony Coelho and cosponsored by Representatives Hoyer, Fish, Hawkins, Conte, Owens of New York, Ackerman, Atkins, Beilenson, Bennett, Borski, Bosco, Boxer, Campbell of California, Cardin, Clay, Crockett, de Lugo, Donnelly, Dwyer, Dymally, Edwards of California, Fazio, Feighan, Frank, Frost, Fuster, Gejdenson, Gordon, Hayes of Illinois, Hutto, Jacobs, Jontz, Kastenmeier, Kleczka, Levin, Lewis of Georgia, Manton, Matsui, McCloskey, McDermott, McHugh, Mfume, Miller of California, Mineta, Morella, Oberstar, Pallone, Pelosi, Richardson, Rowland of Connecticut, Schneider, Shays, Smith of Vermont, Solarz, Studds, Traxler, Udall, Vento, Waxman, Weiss, Wise, Wolpe, Florio, Williams, Roybal, Morrison of Connecticut, Brown of California, Dellums, Sabo, Espy, Dixon, Miller of Washington, Young of Alaska, Foglietta, Rangel, Garcia, Saiki, Martinez, Mavroules, Conyers, Markey, Visclosky, Kildee, Collins, Towns, Kennelly, Gray, Wheat, Gephardt, Levine, Ford of Tennessee, Rahall, Akaka, Moakley, Lantos, Sawyer, McNulty, Brennan, Downey, Guarini, Yates, Gilman, Lehman, Frenzel, Unsoeld, Bryant, Boehlert, Owens of Utah, Dicks, Machtley, Schroeder, Bonior, Carper, Kennedy, Lehman of California, Durbin, Coyne, Walgren, Horton, Kolter, Berman, Bilbray, Boucher, Gonzalez, Engel, AuCoin, Fauntroy, Mrazek, Ford of Michigan, Stokes, Boggs, Lipinski, Bustamante, Hall of Ohio, Dorgan, Volkmer, Walsh, Kaptur, Poshard, Neal of Massachusetts, Roe, Derrick, Jones of Georgia, Savage, Bates, Hertel, Torricelli, Jones of North Carolina, Panetta, Ravenel, Traficant, Oakar, DeFazio, Fascell, Payne of New Jersey, Ridge, Sikorski, Stark, Torres, Hughes, Byron, Smith of Florida, Hochbrueckner, Wilson, Leland, Slaughter of New York, Costello, Evans, Darden, Skaggs, Yatron, Sangmeister, Jenkins, Johnson of South Dakota, Green, Dyson, Clement, Slattery, Kostmayer, Nowak, Scheuer, Carr, Hamilton, McMillen, Swift, Flake, Hubbard, Coleman of Texas, Chapman, Eckart, Regula, Long, Early, Rose, Tallon, Bevill, Lowey, Gibbons, Wyden, Neal of North Carolina, Sharp, Campbell of Colorado, Hoagland, Andrews, Annunzio, Aspin, Murphy, Glickman, Perkins, Skelton, Weber, Johnson of Connecticut, Rowland of Georgia, Price, Gunderson, Staggers, Porter, Leach, Anderson, Nagle, Pickle, Davis, Spratt, Bruce, Hyde, Leath of Texas, Mollohan, and Nelson of Florida.

II. SUMMARY OF THE LEGISLATION

The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable

standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

The ADA defines "disability" to mean, with respect to an individual: a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment.

Title I of the ADA specifies that an employer, employment agency, labor organization, or joint labor-management committee may not discriminate against any qualified individual with a disability in regard to any term, condition or privilege of employment. The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973, including the obligation to provide reasonable accommodations unless it would result in an undue hardship on the operation of the business.

The ADA incorporates by reference the enforcement provisions under title VII of the Civil Rights Act of 1964 (including injunctive relief and back pay). Title I goes into effect two years after the date of enactment. For the first two years after the effective date, employers with 25 or more employees are covered. Thereafter, employers with 15 or more employees are covered.

Title II of the ADA specifies that no qualified individual with a disability may be discriminated against by a department, agency, special purpose district, or other instrumentality of a State or a local government. In addition to a general prohibition against discrimination, title II includes specific requirements applicable to public transportation provided by public transit authorities. Finally, title II incorporates by reference the enforcement provisions in section 505 of the Rehabilitation Act of 1973.

With respect to public transportation, all new fixed routine buses must be made accessible unless a transit authority can demonstrate that no lifts are available from qualified manufacturers. A public transit authority must also provide paratransit for those individuals who cannot use mainline accessible transportation up to the point where the provision of such supplementary services would pose an undue financial burden on a transit authority.

Title II takes effect 18 months after the date of enactment, with the exception of the obligation to ensure that new public buses are accessible, which takes effect for solicitations made 30 days after the date of enactment.

Title III of the ADA specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation operated by a private entity. Public accommodations include: restaurants, hotels, doctors' offices, pharmacies, grocery stores, shopping centers, and other similar establishments.

Existing facilities must be made accessible if the changes are "readily achievable", i.e., easily accomplishable without much difficulty or expense. Auxiliary aids and services must be provided unless such provision would fundamentally alter the nature of the

program or cause an undue burden. New construction and major renovations must be designed and constructed to be readily accessible to and usable by people with disabilities. Elevators need not be installed if the building has less than three stories or has less than 3,000 square feet per floor except if the building is a shopping center, shopping mall, offices for health care providers or if the Attorney General decides that other categories of buildings require the installation of elevators.

Title III also includes specific prohibitions on discrimination in public transportation services provided by private entities, including the failure to make new over-the-road buses accessible six years from the date of enactment for large providers and seven years for small providers.

The provisions of title III become effective 18 months after the date of enactment. Title III incorporates enforcement provisions in private actions comparable to the applicable enforcement provisions in title II of the Civil Rights Act of 1964 (injunctive relief) and provides for pattern and practice cases by the Attorney General, including authority to seek monetary damages and civil penalties.

Title IV of the ADA specifies that telephone services offered to the general public must include interstate and intrastate telecommunication relay services so that such services provide individuals who use nonvoice terminal devices because of disabilities (such as deaf persons) with opportunities for communications that are equivalent to those provided to individuals able to use voice telephone services.

Title V of the ADA includes miscellaneous provisions, including a construction clause explaining the relationship between the provisions in the ADA and the provisions in other Federal and State laws; a construction clause explaining that the ADA does not disrupt the current nature of insurance underwriting when based on valid classification of risk; a prohibition against retaliation; a clear statement that States are not immune from actions in Federal court for a violation of the ADA; a directive to the Architectural and Transportation Barriers Compliance Board to issue guidelines; authority to award attorney's fees, litigation expenses and costs; a requirement for the provision of technical assistance from the Federal agencies responsible for the different sections of this Act; a provision for a study of the effect of Federal wilderness designations on the usage of such areas by persons with disabilities; certain limitations on the definition of disability; an amendment to the Rehabilitation Act of 1973; provisions concerning illegal drug use; and the application of the protections of this Act to the Congress and all of its instrumentalities.

III. Hearings

Hearings were held before the Subcommittee on Select Education and the Subcommittee on Employment Opportunities on legislation to establish a clear and comprehensive prohibition of discrimination on the basis of disability on September 27 and October 24, 1988, and July 18, August 28, September 13, and October 6, 1989.

Hearing witnesses whose names are listed henceforth with no designated affiliation are people with disabilities.

On September 27, 1988, a joint hearing was held in Washington, D.C., before the Subcommittee on Select Education and the Senate Subcommittee on the Handicapped on H.R. 4498 and S. 2345, the Americans with Disabilities Act of 1988. Among the witnesses testifying were: Sandra Parrino, Chairperson, National Council on the Handicapped; Admiral James Watkins, Chairperson, President's Commission on the Human Immunodeficiency Virus Epidemic; Mary Linden of Morton Grove, Illinois who lived in an institution; Dan Piper, an 18 year old with Down Syndrome and Sylvia Piper of Ankeny, Iowa; Jade Calegory, a 12 year old movie actor with Spina Bifida from Corona Del Mar, California; and Lakisha Griffin from Talladega, Alabama, who attends the Alabama School for the Blind.

Also testifying were: Judith Heumann, World Institute on Disability, Berkeley, California; Gregory Hlibok, student body president of Gallaudet University, Washington, D.C.; Belinda Mason from Tobinsport, Indiana who has AIDS; and W. Mitchell from Denver, Colorado, who uses a wheelchair and who was severely burned.

David Saks, on behalf of the Organization for Use of the Telephone, Baltimore, Maryland, also provided testimony.

On October 24, 1988, at the Lafayette Hotel in Boston, Massachusetts, the Subcommittee on Select Education held a hearing on H.R. 4498, the Americans with Disabilities Act of 1989. The Subcommittee heard testimony from the following witnesses from six New England states: Ray Atkinson, Center for Independent Living and Working; Elmer Bartels, Commissioner, Massachusetts Rehabilitation Commission; Robert E. Baton, Greater Hartford Advocates for Change; Lelia Batten, Portland Coalition for Psychiatrically Labeled; Ken Beachman.

Also testifying were: Nancy Blackmoor, Harvard Dyslexia Society; Eleanor Blake, Sarah Bloor; James Broks, Disability Law Center; Philip Campbell, Association for Retarded Citizens of Massachusetts; Joseph Caudre, AIDS Advisory Board, State of Massachusetts; William Cavanaugh, Ad Lib, Inc.; Matthew Chao, Bay State Council for the Blind; Stephen Cohen; Charles Crawford, Massachusetts Commission for the Blind.

Also testifying were: Justin W. Dart, Jr., Chairperson, Task Force on the Rights and Empowerment of Americans with Disabilities; Speed Davis, Massachusetts Office of Handicapped Affairs; Patricia Deegan, Northeast Independent Living Center; Virginia Domini, Independence Unlimited; Bill Dorfer; Susan Downie; Ilona Durkin; Nancy Durkin, CILSC; Neil Eichorn; Larry Espling; Eugenia Evans; William Fennessee; Tim Foley; Sandy Gorski.

Also testifying were: Eric Griffin, vice president, external affairs, National Council on Independent Living; Lind Hanscom, Americans Disabled for Accessible Public Transportation; Edith Harris, Volunteers Disabilities Network of Eastern Connecticut, Inc.; Jen Healy, Deaf-Blind Contact Center; Lynda Hoffman; Eileen Healy Horndt, Independence Northwest; Nancy Husted-Jensen, Governor's Commission on the Handicapped; Barbara Johnson.

Also testifying were: Jerry Johnson, Names Project New England; Philip Johnston, Massachusetts Office of Human Services; Cindy Kappe; Denise Karuth, Massachusetts Coalition of Citizens with Disabilities; Ted Kennedy, Jr.; Bill Knight, Greater Waterbury Consumer Action Forum; Stanley Koslowski, Connecticut Office of Protection and Advocacy; Janet Kyricos; Shellie Lemelin; Marilyn Levin, Massachusetts Department of Mental Health; Donald Levine, Barry Independent Living Association; Ruth Long, Vermont Center for Independent Living.

Also testifying were: Lisa Lyons; Joseph Mallen; Cathie Marshall; Melissa Marshall, Disabilities Network of Eastern Connecticut; Mary McCarthy, Massachusetts Department of Mental Retardation; Cindy Miller; Linda Mills, Kathleen Mulligan; Peter Myette, Mayor's Commission on People with Disabilities, Boston; John Nelson; Emeka Nwojke, Northeast Independent Living Program; Bonnie O'Day, Independence Center of Hampton Roads, VA; Michael Oestreicher, Challenges Unlimited; Patrick Palotto, Bridgeport Telegram; Linda Pelletier; Ed Preneta, Connecticut Developmental Disabilities Office.

Also testifying were: Marilyn Price-Spivack, National Head Injury Foundation; Julie Reisken, Connecticut Coalition of Citizens with Disabilities; Judy Rogers; Marcie Roth, We Care; Charles Sabatier; Eleanor Smith; Robert St. Larent; Rima Sutton, National Multiple Sclerosis Society; Shelley Teed-Wargo, Connecticut Union of Disability Action Groups; Ellen Telker; Larry Urban, Renaissance Club; Diana Viet, Massachusetts Office of Handicapped Affairs; Barbara Waters; Alan Wein; Bill Williams; Laurie Williams; Barbara Wood-Johnson, Massachusetts Commission for the Deaf and Hard of Hearing; Paul Zapan, Independence Unlimited.

On July 18, 1989, in Washington, D.C., the Subcommittee on Select Education and the Subcommittee on Employment Opportunities heard testimony from: the Reverend Jesse Jackson; Representative Donald M. Payne, testifying for the Congressional Black Caucus; Justin Dart, Jr., Chairman, Task Force on the Rights and Empowerment of Americans with Disabilities; Joseph Rauh and Chai R. Feldblum, Leadership Conference on Civil Rights; Sandra Parrino, Chairperson, National Council on Disability; Brother Philip Nelan, National Restaurant Association.

On August 28, 1989, at the Metropolitan Multiservice Center, Houston, Texas, the Subcommittee on Select Education heard testimony from: Kathryn J. Whitmire, Mayor, City of Houston; Nikki Van Hightower, Treasurer, Harris County; Melody Ellis, President, Board of Education, Houston Independent School District; Judith Comfort, Division Manager, External Affairs, Southwestern Bell Telephone Company; Robert C. Lanier, Chairman Metropolitan Transit Authority of Harris County and President, Landar Corporation; Howard Wolf, Chairman of the Board of Trustees of the Institute for Rehabilitation and Research, Houston, Texas, and partner, Fulbright & Jaworski; Honorable Ashley Smith, Texas House of Representatives; Honorable Chet Brooks, Texas State Senate.

On September 13, 1989, in Washington, D.C., the Subcommittee on Select Education and the Subcommittee on Employment Opportunities heard testimony from: Evan Kemp, Commissioner, Equal Employment Opportunities Commission; Jay Rochlin, Executive Di-

rector, President's Committee on Employment of People with Disabilities; Arlene Mayerson, Directing Attorney, Disability Rights Education and Defense Fund; Mark Donovan, Manager, Community Employment and Training Programs, Marriott Corporation; Duane Rasmussen, President, Sell Publishing Company; Paul Wharen, Project Manager, Thomas P. Harkins, Inc.

On October 6, 1989, at University Place Conference Center, Indianapolis, Indiana, the Subcommittee on Select Education heard testimony from: Greg Fehribach, Chairman, Indiana Governor's Council on People with Disabilities and attorney, Timmons, Endsley, Chavis, Baker and Lewis; Barry Chambers, Commissioner, Indiana Department of Human Services; Deanna Durrett for Joseph Reum, Indiana Department of Mental Health; Muriel Lee, Governor's Planning Council for Persons with Disabilities; Jack Lewis, Professor of Sociology and Social Work, Anderson University, Indiana; David Reynolds, Indiana School for the Deaf, Janna Shishler, law clerk for United States Magistrate John Paul Godich.

Also testifying were Nanette Bowling, Staff Liaison to the Mayor's Advisory Council for Handicapped Individuals, Office of Mayor Bob Sargent, Kokomo, Indiana; John Turney, Member, Mayor's Advisory Council for Handicapped Individuals, Kokomo, Indiana; Michael Williams, Vice President for Ancillary Services, St. Joseph's Hospital, Kokomo, Indiana, Kokomo Employer of the Year; Rick Edwards, Program Consultant, Indiana Office of Vocational Rehabilitation; Jeff Myers, former Police Officer, Indianapolis; Marchell Hunt, Chairperson, Common Concerns, the Disability Advocacy Organization; David Scott, Indianapolis Resource Center for Independent Living; Gary May, Commissioner, Indiana Department of Veterans' Affairs.

In order to gather information on the extent and nature of disability discrimination in America, Major R. Owens, Chairman of the Subcommittee on Select Education established the Task Force on the Rights and Empowerment of Americans with Disabilities in May, 1988, appointing Justin Dart, Jr. as Chair. Elizabeth Boggs, cofounder, Association for Retarded Citizens of the United States was appointed as Co-Chairperson. Appointed as Coordinator was Lex Frieden, currently Executive Director of the Institute for Rehabilitation Research and former Executive Director of the National Council on the Handicapped at the time the Council recommended the enactment of ADA and drafted the initial bill.

Mr. Dart chaired 63 Task Force public forums involving people with disabilities, advocates, service providers, government officials in all 50 states, the District of Columbia and the territories. In all, an estimated 8,000 individuals attended these forums. The Task Force submitted a report to the Congress outlining its findings and recommendations.

The other distinguished members of the Task Force, who were selected in order to ensure its representativeness, were: Elmer Bartels, Massachusetts Rehabilitation Commission, Wade Blank, Atlantis Community; David Bodenstein, National Association of People with AIDS; Frank Bowe, Hofstra University; Marca Bristo Kettlewell, National Council on Independent Living; Dale Brown, President's Committee on Employment of People with Disabilities; Philip Calkins, President's Committee on Employment of People

with Disabilities; David Capozzi, Project ACTION; Julie Clay, University of Montana; Susan Daniels, President's Committee on Employment of People with Disabilities; James DeJong, Illinois Coalition of Citizens with Disabilities; Eliot Dober, Office of Protection and Advocacy for Handicapped and Developmentally Disabled Persons; Don Galloway, Keith Gann, P.W. Alive; James Havel, National Alliance for the Mentally Ill; I. King Jordan, Gallaudet University; Paul Marchand, Association for Retarded Citizens; Connie Martinez, California State Council on Developmental Disabilities; Celane McWhorter, The Association for Persons with Severe Handicaps; Oral Miller, American Council of the Blind; Gary Olsen, National Association of the Deaf; Mary Jane Owen, Disability Focus; Sandra Parrino, National Council on Disability; Ed Roberts, World Institute on Disability; Joseph Rogers, National Mental Health Consumers Association; Liz Savage, Epilepsy Foundation of America; William A. Spencer, The Institute for Rehabilitation and Research; Marilyn Price Spivack, National Head Injury Foundation; Ann Vinup, Association for Children and Adults with Learning Disabilities; Sylvia Walker, Howard University; Patrisha Wright, Disability Rights Education and Defense Fund, Inc.; and Tony Young, Fairfax Opportunities Unlimited. The Committee would like also to recognize the special contributions of the volunteer support staff which included Douglas Burleigh, Yoshiko Dart, Tsuneka Gozu, Marcia Lee Nelson, Gwyneth Rochlin, Marnie Sweet, and Hisako Takei.

IV. Need for the Legislation

The Committee, after extensive review and analysis over a number of Congressional sessions, concludes that there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of employment in the private sector, public accommodations, public services, transportation, and telecommunications.

Nature and extent of discrimination on the basis of disability in general

Testimony presented to the Subcommittees on Select Education and Employment Opportunities, two recent reports by the National Council on Disability (*Toward Independence* (1986) and *On the Threshold of Independence* (1988)), a report by the U.S. Civil Rights Commission (*Accommodating the Spectrum of Individual Abilities* (1983)), polls taken by Louis Harris and Associates (*The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream"* (March, 1986) and *The ICD Survey II: Employing Disabled Americans* (1987)), a report of the Presidential Commission on the Human Immunodeficiency Virus Epidenic (1988), and the report by the Task Force on the Rights and Empowerment of Americans with Disabilities all reach the same fundamental conclusions:

(1) historically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society;

(2) discrimination still persists in such critical areas as employment in the private sector, public accommodations, public services, transportation, and telecommunications;

(3) current Federal and State laws are inadequate to address the discrimination faced by people with disabilities in these critical areas;

(4) people with disabilities as a group occupy an inferior status socially, economically, vocationally, and educationally; and

(5) discrimination denies people with disabilities the opportunity to compete on an equal basis with others and costs the United States, State and local governments, and the private sector billions of dollars in unnecessary expenses resulting from dependency and non-productivity.

Discrimination against people with disabilities includes segregation, exclusion, or other denial of benefits, services, or opportunities to people with disabilities that are as effective and meaningful as those provided to others.

Discrimination against people with disabilities results from actions or inactions that discriminate by effect as well as by intent or design. Discrimination also includes harms resulting from the construction of transportation, architectural, and communication barriers or the adoption or application of standards, criteria, practices or procedures that are based on thoughtlessness or indifference—that discrimination resulting from benign neglect.

The testimony presented by Judith Heumann, World Institute on Disability, illustrates several of these forms of discrimination:

> When I was 5 my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard. I was forced to go into home instruction, receiving one hour of education twice a week for 3½ years. My entrance into mainstream society was blocked by discrimination and segregation. Segregation was not only on an institutional level but also acted as an obstruction to social integration. As a teenager, I could not travel with my friends on the bus because it was not accessible. At my graduation from high school, the principal attempted to prevent me from accepting an award in a ceremony on stage simply because I was in a wheelchair.
>
> When I was 19, the house mother of my college dormitory refused me admission into the dorm because I was in a wheelchair and needed assistance. When I was 21 years old, I was denied an elementary school teaching credential because of "paralysis of both lower extremities sequelae of poliomyelitis." At the time, I did not know what sequelae meant. I went to the dictionary and looked it up and found out that it was "because of." So it was obviously because of my disability that I was discriminated against.
>
> At the age of 25, I was told to leave a plane on my return trip to my job here in the U.S. Senate because I was flying without an attendant. In 1981, an attempt was made to forcibly remove me and another disabled friend

from an auction house because we were "disgusting to look at." In 1983, a manager at a movie theater attempted to keep my disabled friend and myself out of his theater because we could not transfer out of our wheelchair.

These are only a few examples of discrimination I have faced in my 40-year life. I successfully fought all of these attempted actions of discrimination through immediate aggressive confrontation or litigation. But this stigma scars for life. (Testimony before House Committee on Education and Labor and Senate Committee on Labor and Human Resources, September 27, 1988, pp. 74-75.)

Discrimination against people with disabilities also includes adverse actions taken against individuals with histories of a disability, and adverse actions taken against those regarded by others as having a disability. It also includes discrimination against persons associated with individuals with disabilities. Such discrimination often results from false presumptions, generalizations, misperceptions, patronizing attitudes, ignorance, irrational fears, and pernicious mythologies.

Discrimination also includes the effects a person's disability may have on others. For example, in March, 1988, the *Washington Post* reported the story of a New Jersey zoo keeper who refused to admit children with Down's Syndrome because he feared they would upset the chimpanzees. The Supreme Court in *Alexander* v. *Choate,* 469 U.S. 287 (1985) cited as an example of improper discrimination on the basis of handicap a case in which "a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates." 117 Cong. Rec. 45974 (1971).

The Supreme Court in *School Board of Nassau County* v. *Arline,* 480 U.S. 273 (1987) cited remarks of Senator Mondale describing a case in which a woman "crippled by arthritis" was denied a job not because she could not do the work but because "college trustees [thought] 'normal students shouldn't see her.'" 118 Cong. Rec. 36761 (1972), quoted in *Arline,* 480 U.S. at 283 n. 9.

The Committee heard testimony about a woman from Kentucky who was fired from the job she had held for a number of years because the employer found out that her son, who had become ill with AIDS, had moved into her house so she could care for him. In that case, the women was discriminated against simply because of her association with a person with a disability. Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, pp. 76-77.

With respect to the pervasiveness of discrimination in our nation, the National Council on Disability explained:

> A major obstacle to achieving the societal goals of equal opportunity and full participation of individuals with disabilities is the problem of discrimination . . . The severity and pervasiveness of discrimination against people with disabilities is well documented. (Appendix to *Toward Independence,* a report to the President and Congress of the

United States by the National Council on Disability, February, 1986, p. A-3.)

The U.S. Commission on Civil Rights recently concluded, with respect to people with disabilities, that:

> Despite some improvements . . . [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation. (U.S. Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities,* p. 159.)

The Commission further observed that "discriminatory treatment of handicapped people can occur in almost every aspect of their lives." Ibid., p. 40.

The Louis Harris polls found that:

> By almost any definition, Americans with disabilities are uniquely underprivileged and disadvantaged. They are much poorer, much less well educated and have much less social life, have fewer amenities and have a lower level of self-satisfaction than other Americans. (Testimony before Senate Subcommittee on the Handicapped by Humphrey Taylor, Louis Harris and Associates, S. Hrng. 100-166, part 2, April 28, 1987, p. 9.)

Admiral James Watkins, former chairperson of the President's Commission on the Human Immunodeficiency Virus Epidemic, testified that after 45 days of public hearings and site visits, the Commission concluded that discrimination against individuals with HIV infection is widespread and has serious repercussions for both the individual who experiences it and for this nation's efforts to control the epidemic. The Report concludes:

> As long as discrimination occurs, and no strong national policy with rapid and effective remedies against discrimination is established, individuals who are infected with HIV will be reluctant to come forward for testing, counseling, and care. This fear of potential discrimination . . . will undermine our efforts to contain the HEV epidemic and will leave HIV-infected individuals isolated and alone. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 40.)

Justin Dart, the chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities, testified that after 63 public forums he chaired in every state, there is overwhelming evidence that:

> Although America has recorded great progress in the area of disability during the past few decades, our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, so-

ciety-wide discrimination. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 62.)

The U.S. Attorney General, Dick Thornburgh, on behalf of President Bush has testified that:

> Despite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence. (Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 58, October 11, 1989, p. 191.)

EMPLOYMENT

Individuals with disabilities experience staggering levels of unemployment and poverty. According to a recent Louis Harris poll "not working" is perhaps the truest definition of what it means to be disabled in America. Two-thirds of all disabled Americans between the age of 16 and 64 are met working at all; yet, a large majority of those not working say that they want to work. Sixty-six percent of working-age disabled persons, who are not working, say that they would like to have a job. *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream,* p. 50. Translated into absolute terms, this means that about 8.2 million people with disabilities want to work but cannot find a job. *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Maintream,* pp. 47-50.

Despite the enactment of Federal legislation such as the Education for all Handicapped Children Act of 1975 and the Rehabilitation Act of 1973, a U.S. Census Bureau Report issued in July, 1989 reported the following findings:

(A) The percentage of men with a work disability working full time fell 7 percent from 20 percent in 1981 to 23 percent in 1988. U.S. Department of Commerce, Bureau of the Census, *Labor Force Status and other Characteristics of Persons with Work Disabilities: 1981-1988.* Current Population Reports, Special Studies Series P-23, No. 160, Table C, p. 4.

(B) The income of workers with disabilities dropped sharply compared to other workers. In 1980, men with disabilities earned 23 percent less than men with no work disability, and by 1988 this had dropped to 36 percent less than their counterparts. In 1980, women with disabilities earned 30 percent less than women with no disabilities, and by 1988 this had dropped to 38 percent less than their counterparts. Ibid., Table D, p. 5.

Forty percent of all adults with disabilities did not finish high school—three times more than non-disabled individuals. In 1984, fifty percent of all adults with disabilities had household incomes of $15,000 or less. Among non-disabled persons, only twenty-five percent had household incomes in this wage bracket. Ibid., p. 2.

President Bush has stated:

> The statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority

in America. (Statement of Vice President George Bush on Disabled Americans, March 31, 1988, p. 2.)

According to the Louis Harris poll, the majority of those individual with disabilities not working and out of the labor force must depend on insurance payments or government benefits for support.

Louis Harris' poll also found that large majorities of top managers (72 percent), equal opportunity officers (76 percent), and department heads/line managers (80 percent) believe that individuals with disabilities often encounter job discrimination from employers and that discrimination by employers remains an inexcusable barrier to increased employment of disabled people. *The ICD Survey II: Employing Disabled Americans,* p. 23.

According to testimony presented to the Subcommittees by Arlene Mayerson of the Disabilities Rights Education and Defense Fund, the major categories of job discrimination faced by people with disabilities include: use of standards and criteria that have the effect of denying such individuals equal job opportunities; failure to provide or make available reasonable accommodations; refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others; placement into dead-end jobs; under-employment and lack of promotion opportunities; and use of application forms and other pre-employment inquiries that inquire about the existence of a disability rather than about the ability to perform the essential functions of a job. Testimony before the House Subcommittees on Select Education and Employment Opportunities, September 13, 1989, No. 101-51, pp. 53-73.

Several witnesses also explained that title I of the ADA (employment discrimination) is modeled after regulations implementing the Rehabilitation Act of 1973, which prohibits discrimination by recipients of Federal assistance and requires affirmative action by Federal contractors and that compliance with these laws has not been onerous.

Reasonable accommodation is a key requirement of the Rehabilitation Act and of this Act. These accommodations will be more or less expensive, depending on the need of the individual and the job.

Jay Rochlin, Executive Director of the President's Committee on Employment of People With Disabilities, testified that a 1982 study showed that a majority of accommodations provided by Federal contractors involved little or no cost. Testimony before the House Subcommittees on Select Education and Employment Opportunities, September 13, 1989, No. 101-51, p. 35. According to the President's Committee, which operates the Job Accommodation Network, some typical accommodations include:

A timer with an indicator light which allowed a medical technican who was deaf to perform the laboratory tests required for her job;

A light probe which allowed a receptionist who was visually impaired to determine which lines on a telephone were ringing, on hold, or in use at her company;

A headset for a phone which allowed an insurance salesperson with cerebral palsy to write while talking.

Witnesses also explained that there will be a need for more expensive accommodations as well, including readers for blind persons, interpreters for deaf persons, and physical accommodations for those with mobility impairments. But even costs for these accommodations are frequently exaggerated. Evan Kemp, Commissioner of the Equal Employment Opportunity Commission, explained to the Committee:

> Sears and Roebuck made their whole national headquarters accessible for $7,600 with TTY's, ramps, this and that and the other thing. It is hard to believe that they could do it for that cheap a price. But if a person wants disabled people, the accommodations really don't become a burden. If they don't, they always do. (Testimony before House Subcommittees on Select Education and Employment Opportunities, September 13, 1989, No. 101-51, p. 20.)

Charles Crawford, Commissioner for the Massachusetts Commission for the Blind, stated:

> . I think that the application of technology for disabled persons will bring down the cost of a number of accommodations. For example, with the blind community, it is possible through microcomputer networks and braille production to produce accessible materials and with very little cost to that. (Testimony before House Subcommittee on Select Education, October 24, 1988, No. 100-109, p. 29.)

In sum, testimony indicates that the provision of various types of reasonable accommodations for individuals with various types of disabilities is essential to accomplishing the critical goal of this legislation—to allow individuals with disabilities to be part of the economic mainstream of our society.

PUBLIC ACCOMMODATIONS

Based on testimony presented at the hearings and recent national surveys and reports, it is clear that an overwhelming majority of individuals with disabilities lead isolated lives and do not frequent places of public accommodation.

The National Council on Disability summarized the findings of a recent Louis Harris poll:

> The survey results dealing with social life and leisure experiences paint a sobering picture of an isolated and secluded population of individuals with disabilities. The large majority of people with disabilities do not go to movies, do not go to the theater, do not go to see musical performances, and do not go to sports events. A substantial minority of persons with disabilities never go to a restaurant, never go to a grocery store, and never go to a church or synagogue . . The extent of non-participation of individuals with disabilities in social and recreational activities is alarming. (National Council on Disability, *Implications for Federal Policy of the 1986 Harris Survey of Americans with Disabilities,* p. 37.)

Several witnesses addressed the obvious question: "Why don't people with disabilities frequent places of public accommodations and stores as often as other Americans?" Three major reasons were given by witnesses.

The first reason is that people with disabilities do not feel that they are welcome and can participate safely in places of public accommodation because of discriminatory actions that have occurred in the past. The second reason is fear and self-consciousness about their disabilities—also stemming from degrading and discriminatory experiences that they or their friends with disabilities have experienced in the past. The third reason is architectural, communication, and transportation barriers.

Former Senator Lowell Weicker quoted the 1986 report of the National Council on the Handicapped report *Toward Independence:*

> People with disabilities have been saying for years that their major obstacles are not inherent in their disabilities, but arise from barriers that have been imposed externally and unnecessarily. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, September 27, 1988, S. Hrng. 100-926, p. 3.)

It is critical to define places of public accommodations to include all places open to the public, not simply restaurants, hotels, and places of entertainment (which are the types of establishments covered by title II of the Civil Rights Act of 1964) because discrimination against people with disabilities is not limited to specific categories of public accommodations. The Attorney General has stated that we must bring Americans with disabilities into the mainstream of society "in other words, full participation in and access to all aspects of society." Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 58, October 11, 1989, p. 192.

Robert Burgdorf, Jr., currently a Professor of Law at the District of Columbia School of Law, testifying on behalf of the National Easter Seal Society, has stated:

> . . . it makes no sense to bar discrimination against people with disabilities in theaters, restaurants, or places of entertainment but not in regard to such important things as doctor's offices. It makes no sense for a law to say that people with disabilities cannot be discriminated against if they want to buy a pastrami sandwich at the local deli but that they can be discriminated against next door at the pharmacy where they need to fill a prescription. There is no sense to that distinction. (Testimony before Senate Subcommittee on the Handicapped, S. Hrng. 101-156, May 10, 1989, p. 100.)

Witnesses identified the major areas of discrimination that need to be addressed. The first is lack of physical access to facilities. Witnesses recognized that it is probably not feasible to require that existing facilities be completely retrofitted to be made accessible. However, it is appropriate to require modest changes. Numerous inexpensive changes can be made to make a facility accessible, including installing a permanent or portable ramp over an entrance

step; installing offset hinges to widen a doorway; relocating a vending machine to clear an accessible path; and installing signage to indicate accessible routes and features within facilities.

Several witnesses also recognized that newly constructed buildups should be fully accessible because the additional costs for making new facilities accessible are often nonexistent or negligible. According to Michael Oestreicher, who directs an architectural firm that designs barrier-free environments, there is absolutely no reason why new buildings constructed in America cannot be barrier-free since additional cost is not a significant factor. He testified that:

> If accessibility is part of the planning from the onset of a project, then that access costs no more or at the most marginally more than a project with no access. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 99.)

The lack of training provided for designers in our country on how to design for children, older people and people with disabilities, plus the lack of strong, specific, enforceable legislation requiring accessibility, are major impediments to accomplishing barrier free environments, according to witnesses. Oestreicher states that:

> With good common sense, solid design precepts, and most importantly, strong input from disabled people, we can create barrier-free environments. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 100.)

Evan Kemp noted that there is a cost to businesses of lost sales revenues from potential disabled customers who cannot make purchases because of inaccessible premises or practices. Joseph Rauh testified that:

> Accessible design does not cost more money—the human costs of inaccessible design are tremendous. Our society must open its doors to all. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 49.)

Additional areas of discrimination that witnesses identified include: the imposition or application of standards or criteria that limit or exclude people with disabilities; the failure to make reasonable modifications in policies to allow participation, and a failure to provide auxiliary aids and services.

William Cavanaugh provided the Committee with an example of discriminatory practice when he described "the time a friend of mine, Michael, whose disability is cerebral palsy, attempted to go to a movie with me only to be denied admittance by the theater manager who said that Michael presented a liability risk." Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 38.

Another example was provided by Greg Hlibok of Gallaudet University who testified about the need for places of public accommodations to take steps to enhance safety for persons with hearing impairments.

PUBLIC SERVICES

Currently, Title V of the Rehabilitation Act of 1973 prohibits recipients of Federal assistance from discriminating against individuals with disabilities. Many agencies of State and local government receive Federal aid and thus are currently prohibited from engaging in discrimination on the basis of disability. However, where there is no state law prohibiting discriminatory practices, two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently than others who don't have disabilities. The resulting inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities.

TRANSPORTATION

Transportation is the linchpin which enables people with disabilities to be integrated and mainstreamed into society. The National Council on Disability has declared that "accessible transportation is a critical component of a national policy that promotes the self-reliance and self-sufficiency of people with disabilities. People who cannot get to work or to the voting place cannot exercise their rights and obligations as citizens. Accessible transportation will become increasingly important in coming decades as the baby-boom population grows older and experiences the increased transportation handicaps associated with aging." *Toward Independence,* National Council on the Handicapped, February, 1986, p. 33.

Jay Rochlin, Executive Director of the President's Committee on Employment of People with Disabilities, made the same point when he stated:

> It makes little sense to protect an individual from discrimination in employment if, for example, they have less than adequate accessible public transportation services. We have conducted surveys in 45 communities over the last seven years, and, consistently, inaccessible transportation has been identified the major barrier, second only to discriminatory attitudes. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, p. 29.)

Speed Davis, Assistant Director of the Massachusetts Office of Handicapped Affairs, said:

> We regularly talk to individuals who have been forced to turn down job offers or have been fired or have otherwise left jobs because they could not arrange reliable transportation. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 222.)

Witnesses testified about the need to pursue a multi-modal approach to ensuring access for people with disabilities which provides that all new vehicles used for fixed routes are accessible and paratransit is made available for those who cannot use the fixed route accessible vehicles.

Robert Lanier, Chairman of the transit authority serving Houston, Texas, when asked if federal legislation should require all transit systems in the country to provide both paratransit and mainline bus accessibility, said:

> I think you need to provide both . . . because if you do not, there will be an equally significant segment of the handicapped community . . . for whom the lifts are not appropriate. (Testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, pp. 77-78.)

For some people with disabilities who lead or would like to lead spontaneous, independent lives integrated into the community, paratransit is often inadequate or inappropriate for the following reasons, among others: the need to make reservations in advance often conflicts with one's work schedule or interests in going out to restaurants and the like; the cost of rides when used frequently is often exorbitant; limitations on time of day and the number of days that the paratransit operates; waiting time; restrictions on use by guests and nondisabled companions who are excluded from accompanying the person with a disability; the expense to the public agency; and restrictions on eligibility placed on use by social service agencies.

Marchell Hunt, Chairperson of an Indianapolis disability organization, prefers to use the city's buses but was forced to rely on its paratransit services because the city had only six lift-equipped buses:

> The day I was released from the hospital, Metro called to say that they could not pick me up even though I had scheduled my ride three weeks in advance. Currently, there are more than 100 persons on a waiting list to utilize this very limited form of accessible public transportation. (Testimony before House Subcommittee on Select Education, Ser. No. 101-57, October 6, 1989, p. 71.)

However, witnesses also stressed that there are some people with disabilities who are so severely disabled that they cannot use accessible mainline transit and thus there is a need to have a paratransit system for these people.

Several communities which have committed to achieving mainline accessibility have done so with the full involvement of people with disabilities both within and outside transit authorities. The results they have attained are impressive and serve to illustrate that reasons commonly provided as to why mainline accessibility cannot be accomplished reflect myths.

Cambria County Transit Authority in Johnstown, Pennsylvania is 100 percent accessible and operates without problems, notwithstanding hilly terrain and inclement weather, including snow, flooding, and significant extremes in temperatures.

When the decision was intitially made to make the fleet 100 percent accessible there was fear and reluctance on the part of the disability community, the drivers, and the general public. That fear and reluctance has now disappeared. The General Manager of the Cambria County Transit Authority concludes that mainline access

works in his community because of the commitment of everyone to make it work. This includes a need to train and educate top management, drivers and the general public as well as the local disability community.

The new generation of lifts are not having the maintenance problems experienced in the past and they can operate in inclement weather. The Architectural Transportation Barriers Compliance Board has reported that currently most problems with lift operation are the direct result of driver error and that lift maintenance is but one facet of a good maintenance program. Thus, transit, authorities reporting problems with lifts are generally those that also report problems with general maintenance.

With respect to intercity transportation, the Committee learned about reasonably priced lifts that can be installed on buses which will enable people using wheelchairs to have access to these buses. This is particularly critical in rural areas where these buses are often the only mode of transportation that is available.

TELECOMMUNICATIONS

Gregory Hlibok, President of the Student Body Government at Gallaudet University, described some of the obstacles to daily living faced by hearing impaired people:

> Many of us confront discrimination every day. We have experienced the disappointment of being turned down for a job or promotion because we were told the communication barriers were too great. My own deaf brother was told he had to pay for his own interpreter on his job. We have tried to call the police for help using our telecommunications devices for the deaf, but the police hang up on us, because they had no TDD's. I remember when I was fifteen I left school without money to take the bus home. I had no way to call my parents or the police. I had to walk the 3 miles home in the snow. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 80.)

Mr. Hlibok concluded that accessible communications systems are necessary for deaf and hearing impaired people to participate equally and effectively in society.

Currently, 19 States have intrastate TDD relay systems in place which enable hearing impaired and communication impaired persons who use telecommunication devices for the deaf (TDD's) to make calls to and receive calls from individuals using voice telephones. Ten more states are scheduled to begin intrastate service within the next year. The requirement for nationwide intrastate and interstate relay services will enable deaf and hearing impaired people who use TDD's to make calls to and receive calls from individuals using voice telephones in any part of the United States, which enhance both their personal lives and employment opportunities.

ENFORCEMENT

Several witnesses emphasized that the rights guaranteed by the ADA are meaningless without effective enforcement provisions. Elmer Bartels, Commissioner of the Massachusetts Rehabilitation Commission, stated "We know that any law is not self enforcing and that continued efforts to educate and press for policy implementation and support will be necessary." Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 24.

Sandy Parrino related her personal experiences as the mother of two disabled children in lamenting the poor enforcement of existing federal disability rights legislation requiring school buildings to be accessible:

> There is not enough compliance. The village I live in, in Westchester County (N.Y.), Briar Cliff Manor . . . could not see fit to put a ramp in until just this year. Therefore . . . physically disabled people were never able to get into that town hall. That is just one example that has certainly irritated me for many years . . There has not been enough compliance with the 504 regulations . . . It is not enough to just have it down on the books . . . Many schools do not have the elevators or the accessibilities, to this day, 13 years after the bill was enacted. They still are not accessible and the classrooms are not accessible. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 38.)

Howard Wolf, Chairman of the Board of The Institute of Rehabilitation and Research and a practicing attorney in Houston, Texas, stated that successful attempts to weaken the remedies available under the ADA would make the ADA an "empty promise of equality." Testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, p. 64.

SUMMARY

As the summary of the testimony before the Committee demonstrates, the unfortunate truth is that individuals with disabilities are a discrete, specific minority who have been insulated in many respects from the general public. Such individuals have been faced with a range of restrictions and limitations in their lives. Further, they have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of such individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society. Finally, such individuals have often not had the political power and muscle to demand the protections that are rightfully theirs. The simple fact that this Act has taken this long to pass Congress, twenty-five years after other civil rights legislation has been passed, is a testament to that fact. This Act will finally set in place the necessary civil rights protections for people with disabilities.

THE EFFECTS OF DISCRIMINATION ON INDIVIDUALS WITH DISABILITIES

Discrimination has many different effects on individuals with disabilities. Arlene Mayerson of the Disability Rights Education and Defense Fund testified about the nature of discrimination against people with disabilities:

> The discriminatory nature of policies and practices that exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical 'inferiority' of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences that have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities, and being deemed an "unfit parent." These injustices coexist with an atmosphere of charity and concern for disabled people. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, September 13, 1989, pp. 78-79.)

Sandy Parrino, Chairperson of the National Council on Disability explained that:

> Disability does not mean incompetence. The perception that persons with disabilities are dependent by nature is the result of discriminatory attitudes, not the result of disability. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 71.)

Charles Crawford, Commissioner of the Massachusetts Commission for the Blind, explained that:

> For far too long and far too many centuries, disabled people have felt the pain of discrimination, of being held separate, at being looked at as different, as somehow being viewed as lesser . . . I personally have felt the discrimination, the isolation, the sense of helplessness and the sense of no ability to relate to other people because they have shut me out. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 27.)

Charles Sabatier stated:

> Sometimes we get robbed of our dignity, our self-respect, we swallow insults on a daily basis to continue to get along in our society. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 36.)

Emeka Nwojke made the same point when he said:

> It is the elimination of dignity associated with being a human being that I am talking about. (Testimony before

House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 36.)

Judith Heumann explained that:

> In the past disability has been a cause of shame. This forced acceptance of second-class citizenship has stripped us as disabled people of pride and dignity . . . This stigma scars for life. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 74.)

Larry Espling stated:

> At the ethnic festival in Waltham in 1986, I wanted to buy a book on Lithuania at one of the booths. The person sitting thee said, "Why do you want this book? You can't read." Another misconception is that if a person with cerebral palsy marries, any children will have C.P. I know of two C.P. couples with normal children. It's not hereditary . . People say things sometimes as if you can't hear them. I was on a bus and two men near me said, "He'll be put away." I've had things like that happen before. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 188.)

Virginia Domini explained:

> You know the general public doesn't want to see you doing your laundry, being a case worker, a shopper, or a Mom. It is difficult to see yourself as a valuable member of society, and sometimes it is hard to see yourself as a person worthy of so much more respect than you get from the general public. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 87.)

Discrimination produces fear and reluctance to participate on the part of people with disabilities. Fear of mistreatment and discrimination, and the existence of architectural, transportation, and communication barriers, are critical reasons why individuals with disabilities do not participate to the same extent as nondisabled people in public accommodations and transportation.

Ruth Long, Peer Advocate Counselor for the Vermont Center for Independent Living testified about the factors that isolate people with disabilities, and how they are amplified by the rural factor. "Nobody believes that there is really a disabled community in the State of Vermont because they are invisible," she stated. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1988, p. 185.)

Discrimination results in social isolation and in some cases suicide.

Justin Dart testified before the Committee about how his brother and two other family members had committed suicide because of their disabilities and about a California woman, a mother and a TV director before becoming disabled, who said to him:

> We can go just so long constantly reaching dead ends. I am broke, degraded, and angry, have attempted suicide three times. I know hundreds. Most of us try but which way and where can we go? What and who can we be? If I were understood, I would have something to live for. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37 July 18, 1989, p. 58.)

The frustration experienced by many Americans with disabilities was expressed by Cindy Miller:

> I am tired of being tired, fighting angry, and depressed every day fighting for my rights . . . I do not want to be Rosa Parks, I just want to be Cindy Miller. (Testimony before House Subcommittee on Select Education, Ser. No. 100-109, October 24, 1989, p. 161.)

THE EFFECTS OF DISCRIMINATION ON SOCIETY

The Committee also heard testimony and reviewed reports concluding that discrimination results in dependency on social welfare programs that cost the taxpayers unnecessary billions of dollars each year. Sandy Parrino, the chairperson of the National Council on Disability, testified that discrimination places people with disabilities in chains that:

> . . . bind many of the 36 million people into a bondage of unjust, unwanted dependency on families, charity, and social welfare. Dependency that is a major and totally unnecessary contributor to public deficits and private expenditures. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 27.)

She added that:

> It is contrary to sound principles of fiscal responsibility to spend billions of federal tax dollars to relegate people with disabilities to positions of dependency upon public support. (Id. at p. 28.)

President Bush has stated:

> On the cost side, the National Council on the Handicapped states that current (federal) spending on disability benefits and programs exceeds $60 billion annually. Excluding the millions of disabled who want to work from the employment ranks costs society literally billions of dollars annually in support payments and lost income tax revenues. (Statement by Vice President George Bush on Disabled Americans, March 31, 1988, p. 2.)

Attorney General Thornburgh has stated that:

> We must recognize that passing comprehensive civil rights legislation protecting persons with disabilities will have direct and tangilble benefits for our country . . . Certainly, the elimination of employment discrimination and the mainstreaming of persons with disabilities will result

> in more persons with disabilities working, in increasing earnings, in less dependence on the Social Security system for financial support, in increased spending on consumer goods, and increased tax revenues. (Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 101-58, October 11, 1989, p. 811.)

Justin Dart testified that it is discrimination and segregation that are preventing persons with disabilities from becoming self-reliant:

> . . . and that are driving us inevitably towards an economic and moral disaster of giant, paternalistic welfare bureaucracies. We already paying unaffordable and rapidly escalating billions in public and private funds to maintain ever-increasing millions of potentially productive Americans in unjust, unwanted dependency. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, p. 65.)

Thus, discrimination makes people with disabilities dependent on social welare programs rather than allowing them to be taxpayers and consumers.

Discrimination also deprives our nation of a critically needed source of labor in a period where demographic and other changes in our society are creating shortages of qualified applicants in many jobs.

President Bush has stated:

> The United States is now beginning to face labor shortages as the baby boomers move through the work force. The disabled offer a pool of talented workers whom we simply cannot afford to ignore, especially in connection with the high tech growth industries of the future. (Statement of Vice President George Bush on Disabled Americans, March 31, 1988, p. 2.)

Jay Rochlin, the executive director of the President's Committee on Employment of People with Disabilities, explained why the needs of people with disabilities for employment opportunities and the needs of businesses for qualified employees make for what he calls a "win-win" situation:

> The . . (Department of Labor's) *Opportunity 2000* concluded that businesses will be able to satisfy their labor needs only if they successfully confront . . . barriers and empower individuals presently outside the economic mainstream to take advantage of meaningful employment opportunties. ". . . While comprehensive civil rights legislation can provide protections from employment discrimination for persons with disabilities, it will also enhance the private sector's access to an additional resource of human capital—qualified individuals with disabilities." (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, September 13, 1989, p. 33.)

Mr. Rochlin related the story of Tina Saenger, who became quadriplegic as the result of an auto accident. She used a wheelchair but access was not a problem at her job at AT&T where whe worked as a long distance phone operator, because the office was fully accessible. The fact that Tina had limited use of her fingers might have prevented her from being able to perform her job because the office had a policy prohibiting the use of pencils by phone operators to punch in numbers. Under rights provided under section 503 of the Rehabilitation Act, however, Tina was able to have this rule modified as a reasonable accommodation to her disability. Her job performance to this day is outstanding. As Mr. Rochlin says:

> Consider the economic impact of that simple accommodation. It enables Tina to have a job which pays well. She owns both a home and a car and supports her mother in addition to herself. The alternative is no longer acceptable. We should not spend our tax dollars to support someone who is able to be an independent and productive taxpaying citizen, particularly when we can do so, so easily. (Id. at pp. 36-37.)

Justin Dart, Jr. stated:

> As a former CEO of both large and small enterprises, employing persons with severe disabilities and constructing accessible facilities, I know that ADA is affordable for business and that ADA is good business and this is not simply my personal opinion. Every significant requirement of ADA is now being implemented successfully by progressive public and private entities somewhere. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 57.)

In the increasingly competitive international economy, our nation must adopt policies which result in a bridging of the vast gulf separating the actual from the potential contributions of people with disabilities to the health of our economy. To remove the unnecessary barriers shackling people with disabilities is to avail our society of the full range of their talents and abilities. Robert Mosbacher, Jr. stated:

> From the perspective of a private sector employer, this legislation is also extremely important. If we are to remain competitive as a nation in the international marketplace, we must have a well trained, well educated and highly motivated workforce. Millions of disabled Americans who have been denied access to the workplace are well educated and can be easily trained. What is more, they are some of the most highly motivated people in our society today. (Testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, p. 62.)

Our nation's most precious resource is our people. To the extent that the changes in practices and attitudes brought about by implementation of the Act ultimately assist people with disabilities in

becoming more productive and independent members of society, both they and our entire society benefit.

Mark Donovan, Manager of Community Employment and Training Programs for the Marriott Corporation testified:

> . . Marriott is recognized as a leader in the area of employment of people with disabilities . . . I raise that issue because I think it's important to note why Marriott has so aggressively assumed this position. The reason is simple: it makes good, bottom line, business sense. As a corporation operating in the hospitality industry, our employees are our life blood. It is only to the degree to which we can find, attract, train, and retain able and motivated people that we will be successful . . . From our perspective, not to draw upon the resources represented by people with disabilities would be absurd. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, September 13, 1989, pp. 45-46.)

Discrimination also negates the billions of dollars we invest each year to educate our children and youth with disabilities and train and rehabilitate adults with disabilities Howard Wolf, Chairman of the Board of the Institute on Rehabilitation and Research, stated:

> . . . Have we accomplished enough when we educate, rehabilitate and care for people with disabilities only to ignore discrimination against them in the workforce, in transportation, in public accommodations? How many well educated and highly capable people with disabilities must sit down at home every day, not because of their lack of ability, but because of the attitudes of employers, service providers, and government officials? (Testimony before House Subcommittee on Select Education, Ser. No. 101-56, August 28, 1989, p. 67.)

Sylvia Piper, a parent of a child with developmental disabilities testified that:

> We have invested in Dan's future. And the Ankeny public school District has made an investment in Dan's future . . . Are we going to allow this investment of time, energy, and dollars, not to mention Dan's ability and quality of life, to cease when he reaches age 21? (Testimony before House Subcommittee on Select Education and Senate Subcommiteee on the Handicapped, S. Hrg. 100-926, September 27, 1988, pp. 68-69.)

Attorney General Thornburgh has made the same point:

> The continued maintenance of these barriers imposes staggering economic and social costs and inhibits our sincere and substantial Federal commitment to the education, rehabilitation, and employment of persons with disabilities. The elimination of these barriers will enable society to benefit from the skills and talents of persons with disabilities and will enable persons with disabilities to lead more productive lives. (Testimony before House Subcom-

mittee on Civil and Constitutional Rights, Ser. No. 58, October 11, 1989, p. 199.)

Apart from the economic benefits to individuals with disabilities and to the nation that this legislation is expected to bring about, its non-economic improvements in the quality of life of millions of Americans are no less important. The deaf person who can, because of the mandated nationwide TDD hookup, now spontaneously communicate with hearing friends in or out of their state; the woman who uses a wheelchair who can now accompany her children to the newly accessible museum using an accessible bus, or visit her sick mother in another state using a newly accessible intercity bus, or enter the supermakret; the blind individual who can, using newly marked elevator buttons, conveniently get to her sixth floor office appointment; the woman with cerebal palsy now allowed to enter the movie theater—the value of such benefits to individuals who seek to live a full life, free from arbitrary, confining, and humiliating treatment, cannot be calculated. The commitment to promote greater dignity and an improved quality of life for people with disabilities evinced in the provisions of the Act provide further powerful justification for its enactment.

CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE; NEED FOR COMPREHENSIVE FEDERAL LEGISLATION

State laws are indaequate to address the pervasive problems of discrimination that people with disabilities are facing. As Admiral Watkins said:

> My predecessor [Sandy Parrino] here this morning said enough time has, in my opinion, been given to the States to legislate what is right. Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 39.)

The fifty State Governor's Committees, with whom the President's Committee on Employment of People with Disabilities works, report that existing state laws do not adequately counter acts of discrimination against people with disabilities.

Current Federal law is also inadequate. Currently, Federal anti-discrimination laws only address discrimination by Federal agencies, entities that have contracts with the Federal government, and recipients of Federal financial assistance. Last year, Congress amended the Fair Housing Act to prohibit discrimination against people with disabilities in the sale and rental of private housing. However, there are still no protections against discrimination by employers in the private sector, by places of public accommodation, by State and local government agencies that do not receive Federal aid, and with respect to the provision of telecommunication services. With respect to the provisions of accessible transportation services, there have been misinterpretations by executive agencies and some courts regarding the prohibition against discrimination by public entities under the Rehabilitation Act and there has been

no protection from discrimination by private transportation companies not otherwise covered under federal laws.

The need to enact omnibus rights legislation for individuals with disabilities was one of the major recommendations of the National Council on Disability in its two most recent reports to Congress. In fact, H.R. 4498, the Americans With Disabilities Act of 1988, introduced during the 100th Congress, was developed by the Council.

The need for omnibus civil rights legislation was also one of the major recommendations of the Presidential Commission on the HIV Epidemic:

> Comprehensive Federal anti-discrimination legislation, which prohibits discrimination against persons with disabilities in the public and private sectors, including employment, housing, public accommodations and participation in government programs should be enacted. All persons with symptomatic or asymptomatic HIV infection should be clearly included as persons with disabilities who are covered by the anti-discrimination protections of this legislation. (*Report of the Presidential Commission on the Human Immunodeficiency Epidemic,* June, 1988, p. 123.)

Attorney General Thornburgh, on behalf of President Bush, has spoken of the importance of enacting comprehensive civil rights legislation for people with disabilities:

> One of the (the ADA bill's) most impressive strengths is its comprehensive character. Over the last 20 years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections. (Testimony before House Subcommittee on Civil and Constitutional Rights, Ser. No. 101-58, October 11, 1989, p. 812.)

As Jay Rochlin said:

> A break in any link in the chain that connects individuals with disabilities to the workplace or prevents them from functioning independently creates a barrier which many times cannot be bridged. (Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-51, September 13, 1989, p. 29.)

VISION FOR THE FUTURE

Many of the witnesses described the vision of the Americans With Disabilities Act.

Sandy Parrino testified that:

> Martin Luther King had a dream. We have a vision. Dr. King dreamed of an America "where a person is judged not by the color of his skin, but by the content of his character." ADA's vision is of an America where persons are judged by their abilities and not on the basis of their disabilities. (Testimony before House Subcommittee on Select

Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 27.)

Tony Coelho shared the following observation with the Committee:

> While the charity model once represented a step forward in the treatment of person with handicaps, in today's society it is irrelevant, inappropriate and a great disservice. Our model must change. Disabled people are sometimes impatient, and sometimes angry, it for good reason—they are fed up with discrimination and exclusion, tired of denial, and are eager to seize the challenges and opportunities as quickly as the rest of us. (Testimony before House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 15.)

Judith Heumann stated that:

> The passage of this monumental legislation will make it clear that our Government will no longer allow the largest minority group in the United States to be denied equal opportunity. (Testimony before the House Subcommittee on Select Education and Senate Subcommittee on the Handicapped, S. Hrng. 100-926, September 27, 1988, p. 75.)

Perry Tillman, a Vietnam veteran, has stated that:

> I did my job when I was called on by my country. Now it is your job and the job of everyone in Congress to make sure that when I lost the use of my legs I didn't lose my ability to achieve my dreams. Myself and other veterans before me fought for freedom for all Americans. But when I came home and I found out that what I fought for applied to everyone but me and other handicapped people, I couldn't stop fighting. I have fought since my injury in Vietnam to regain my rightful place in society. I ask that you now join me in ending this fight and give quick and favorable consideration to the ADA in order to allow all Americans, disabled or not, to take part equally in American life. (Testimony before Senate Subcommittee on the Handicapped, S. Hrng. 101-156, May 10, 1989, p. 454.)

Justin Dart testified:

> The economic and moral greatness of America is based on providing equal opportunity to wave after wave of previously oppressed and dependent groups. Providing such opportunity to Americans with disabilities will result in yet another period of dynamic growth in the productivity, prosperity, quality of life, and international moral leadership of this nation. (Testimony before the House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 67.)

CONCLUSION

In conclusion, there is a compelling need to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life. Further, there is a need to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities. Finally, there is a need to ensure that the Federal Government plays a central role in enforcing these standards on behalf of individuals with disabilities.

The difficult task before the Committee and, indeed, before the Congress, is to establish standards that fulfill this mandate in a clear, balanced, and reasonable manner. The Committee believes that this legislation has done that. This report explains in detail how that balance has been struck.

V. Summary of Committee Action

H.R. 2273 was brought before the Education and Labor Committee for open markup on November 9, 1989. The markup was commenced but not concluded on that date. Mr. Owens offered an amendment in the nature of a substitute prior to the adjournment of the session.

The markup was resumed on November 15, 1989, at which time Mr. Owens offered an amendment in the nature of a substitute to be considered as an original bill for the purpose of amendment. Twelve amendments to this substitute were offered, all of which were defeated. The Committee voted to adopt and report H.R. 2273, as an amendment in the nature of a substitute, by a roll call vote of 35-0.

VI. Explanation of the Legislation

DEFINITION OF THE TERM "DISABILITY"

Section 3(2) of the legislation defines the term "disability" for purposes of this legislation. The definition of the term "disability" included in the bill is comparable to the definition of the term "individual with handicaps" in section 7(8)(B) of the Rehabilitation Act of 1973 and section 802(h) of the Fair Housing Act.

It is the Committee's intent that the analysis of the term "individual with handicaps" by the Department of Health, Education, and Welfare of the regulations implementing section 504 (42 Fed. Reg. 22685 et seq. (May 4, 1977)) and the analysis by the Department of Housing and Urban Development of the regulations implementing the Fair Housing Amendments Act of 1988 (54 Fed. Reg. 3232 et seq. (Jan. 23, 1989)) apply to the definition of the term "disability" included in this legislation.

The use of the term "disability" instead of "handicap" and the term "individual with a disability" instead of "individual with handicaps" represents an effort by the Committee to make use of up-to-date, currently accepted terminology. In regard to this legislation, as well as in other contexts, the Congress has been apprised of the fact that to many individuals with disabilities the terminology applied to them is a very significant and sensitive issue.

As with racial and ethnic epithets, the choice of terms to apply to a person with a disability is overlaid with stereotypes, patronizing attitudes, and other emotional connotations. Many individuals with disabilities, and organizations representing such individuals, object to the use of such terms as "handicapped person" or "the handicapped." [In recent legislation, Congress has begun to recognize this shift in terminology, e.g., by changing the name of the National Council on the Handicapped to the National Council on Disability, Public Law 100-630.]

The Committee concluded that it was important for the current legislation to use terminology most in line with the sensibilities of most Americans with disabilities. No change in definition or substance is intended nor should be attributed to this change in phraseology.

Finally, this Act is entitled the "Americans with Disabilities Act" to underscore the fact that people with disabilities are part of the tradition and heritage of this great country, and have as much of a right to equal access and opportunity in this country as all other individuals. However, the Committee wishes to emphasize that the title of the Act should not be construed to mean that only "Americans" with disabilities are protected under this Act. The Act protects all individuals with disabilities who are in this country—regardless of their ethnic or national origin and regardless of their status.

The term "disability" means, with respect to an individual—

(1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(2) a record of such an impairment; or

(3) being regarded as having such an impairment.

The first prong of the definition includes any individual who has a "physical or mental impairment." A physical or mental impairment means—(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (2) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

It is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may develop in the future. The term includes, however, such conditions, diseases and infections as: orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, infection with the Human Immunodeficiency Virus, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, drug addiction, and alcoholism.

The term "physical or mental impairment" does not include simple physical characteristics, such as blue eyes or black hair. Further, because only physical or mental impairments are included, environmental, cultural, and economic disadvantages are not in

themselves covered. For example, having a prison record does not constitute having a disability. Age is not a disability, nor is homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental impairment, the person may be considered as having a disability for purposes of this legislation.

A physical or mental impairment does not constitute a disability under the first prong of the definition for purposes of the ADA unless its severity is such that it results in a "substantial limitation of one or more major life activities." A "major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and participating in community activities.

For example, a person who is paraplegic will have a substantial difficulty in the major life activity of walking; a deaf person will have a substantial difficulty in hearing aural communications; and a person with lung disease will have a substantial limitation in the major life activity of breathing. As noted by the U.S. Department of Justice, "Application of Section 504 of the Rehabilitation Act to HIV-Infected Individuals," September 27, 1988, at 9–11, a person infected with the Human Immunodeficiency Virus is covered under the first prong of the definition of the term "disability" because of a substantial limitation to procreation and intimate sexual relationships.

A person with a minor, trivial impairment, such as a simple infected finger is not impaired in a major life activity. A person is considered an individual with a disability for purposes of the first prong of the definition when the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person who can walk for 10 miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort.

Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

The second prong of the definition of the term "disability" includes an individual who has a record of such impairment, i.e., an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

This provision is included in the definition in part to protect individuals who have recovered from a physical or mental impairment which previously substantially limited them in a major life activity. Discrimination on the basis of such a past impairment would be prohibited under this legislation. Frequently occurring examples of the first group (i.e., those who have a history of an impairment) are persons with histories of mental or emotional illness,

heart disease, or cancer; examples of the second group (i.e., those who have been misclassified as having an impairment) are persons who have been misclassified as mentally retarded.

The third prong of the definition includes an individual who is regarded as having a covered impairment. This third prong includes an individual who has physicial or mental impairment that does not substantially limit a major life activity, but that is treated by a covered entity as constituting such a limitation. The third prong also includes an individual who has a physical or mental impairment that substantially limits a major activity only as a result of the attitudes of others toward such impairment or has no physical or mental impairment but is treated by a covered entity as having such an impairment.

The rational for this third prong was clearly articulated by the U.S. Supreme Court in *School Board of Nassua County* v. *Arline,* 480 U.S. 273 (1987). The Court noted that Congress included this third prong because it was as concerned about the effect of an impairment on others as it was about its effect on the individual. As the Court noted, the third prong of the definition is designed to protect individuals who have impairments that do not in fact substantially limit their functioning. The Court explained: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." 480 U.S. at 283.

The Court went on to conclude that:

> By amending the definition of "handicaped individual" to include not only those who are actually physically impaired but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment. (Id., at 284.)

This third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity. For example, severe burn victims often face discrimination. In such situations, these individuals are viewed by others as having an impairment which substantially limits some major life activity (e.g., working or eating in a restaurant) and are discriminated against on that basis. Such individuals would be covered under the Act under the third prong of the definition.

A person who is excluded from any basic life activity, or is otherwise discriminated against, because of a covered entity's negative attitudes toward that person's impairment is treated as having a disability. Thus, for example, if an employer refuses to hire someone because of a fear of the "negative reactions" of others to the individual, or because of the employer's perception that the applicant has an impairment which prevents that person from working, that person is covered under the third prong of the definition of disability. See, e.g., *Arline,* 480 U.S. at 284; *Doe* v. *Centinela Hospital,* 57 U.S.L.W. 2034, No. CV-87-2514-P AR (C.D.Cal., June 30,

1988), *Thornhill* v. *Marsh,* 49 FEP Cases 6 (Feb. 2, 1989) (9th Cir. 1989).

TITLE I—EMPLOYMENT

Title I of the legislation sets forth prohibitions against discrimination on the basis of disability by employers, employment agencies, labor organizations, or joint labor-management committees (hereinafter referred to as "covered entities") with respect to hiring and all terms, conditions, and privileges of employment.

Scope of coverage

The bill covers employers (including governments, governmental agencies, and political subdivisions) who are engaged in an industry affecting commerce and who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year and any agent of such a person; except, for the two years following the effective date of title I, only entities with 25 or more employees are covered. Additional entities covered by title I of the legislation are employment agencies, labor organizations, and joint labor-management committees.

Consistent with title VII of the Civil Rights Act of 1964, the term "employer" under this legislation does not include (i) the United States, or an Indian tribe; or (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986. The United States government, of course, continues to be covered under the Rehabilitation Act of 1973.

Definitions

Several of the definitions set out in title VII of the Civil Rights Act of 1964 are adopted or are incorporated by reference in this legislation—i.e., the terms Commission, employer, person, labor organization, employment agency, commerce, and industry affecting commerce. The term "employee" means an individual employed by an employer. The exception set out in title VII of the Civil Rights Act of 1964 for elected officials and their employees and appointees has been deleted.

Several of the other items, including "reasonable accommodation" and "undue harship" are discussed in detail later in this report.

Actions covered by this legislation

Section 102(a) of the legislation specifies that no covered entity shall discriminate against any qualified individual with a disability because of such individual's disability in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions, and privileges of employment.

This section in intended to include the range of employment decisions. Consistent with regulations implementing section 504 of the Rehabilitation Act of 1973, see 45 CFR 84.11(b), the decisions covered include: (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, award

of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring; (3) rates of pay or any other form of compensation and changes in compensation; (4) job assignment, job classification, organizational structures, position descriptions, lines of progression, and seniority lists; (5) leaves of absence, sick leave, or any other leave; (6) fringe benefits available by virtue of employment, whether or not administered by the covered entity; (7) selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and (8) employer-sponsored activities, including social or recreational programs.

Qualified individual with a disability

The term "qualified individual with a disability" is defined in section 101(7) of the bill to mean an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

This definition is comparable to the definition used in regulations implementing section 501 and section 504 of the Rehabilitation Act of 1973. The phrase "essential functions" means job tasks that are fundamental and not marginal. The point of including this phrase within the definition of a "qualified individual with a disability" is to ensure that employers can continue to require that all applicants and employees, including those with disabilities, are able to perform the essential, i.e., the non-marginal functions of the job in quesiton.

As the 1977 regulations issued by the Department of Health, Education, and Welfare pointed out "inclusion of this phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job." 42 Fed. Reg. 22686 (1977). For example, many employers have a policy that, in order to qualify for a job, an employee must have a driver's license—even though the job does not involve driving. The employer may believe that someone who drives will be on time for work or may be able to do an occasional errand. This requirement, however, would be marginal and should not be used to exclude persons with disabilities who can do the esential functions of the job that do not include driving. In determining what constitutes the essential functions of the job, consideration should be given to the employer's judgment regarding what functions are essential.

The basic concept is that an employer may require that every employee be qualified to perform the essential functions of a job. The term "qualified" refers to whether the individual is qualified at the time of the job action in question; the possibility of future incapacity does not by itself render the person not qualified.

By including the phrase "qualified individual with a disability," the Committee intends to reaffirm that this legislation does not undermine an employer's ability to choose and maintain qualified workers. This legislation simply provides that employment decisions must not have the purpose or effect of subjecting a qualified individual with a disability to discrimination on the basis of his or her disability.

Thus, under this legislation an employer is still free to select applicants for reasons unrelated to the existence or consequence of a disability. For example, suppose an employer has an opening for a typist and two persons apply for the job, one being an individual with a disability who types 50 words per minute and the other being an individual without a disability who types 75 words per minute. The employer is permitted to choose the applicant with the higher typing speed, if typing speed is necessary for successful performance on the job.

On the other hand, if the two applicants are an individual with a hearing impairment who requires a telephone headset with an amplifier and an individual without a disability, both of whom have the same typing speed, the employer is not permitted to choose the individual without a disability because of the need to provide the needed reasonable accommodation to the person with the disability.

In the above example, the employer would be permitted to reject the applicant with a disability and choose the other applicant for reasons not related to the disability or to the accommodation or otherwise not prohibited by this legislation. In other words, the employer's obligation is to consider applicants and make decisions without regard to an individual's disability, or the individual's need for a reasonable accommodation. But, the employer has no obligation under this legislation to prefer applicants with disabilities over other applicants on the basis of disability.

Under this legislation an employer may still devise physical and other job criteria and tests for a job so long as the criteria or tests are job-related and consistent with business necessity. Thus, for example, an employer can adopt a physical criterion that an applicant be able to lift fifty pounds, if that ability is necessary to an individual's ability to perform the essential functions of the job in question. Or, for example, security concerns may constitute valid job criteria. For example, jewelry stores often employ security officers because of the frequency of "snatch and run" thefts. Mobility and dexterity may be essential job criteria functions in such jobs.

Moreover, even if the criteria is legitimate, the employer must still determine whether a reasonable accommodation would enable the person with the disability to perform the essential functions of the job without imposing an undue hardship on the business.

It is also acceptable to deny employment to an applicant or to fire an employee with a disability on the basis that the individual poses a direct threat to the health or safety of others or poses a direct threat to property. The determination that an individual with a disability will pose a safety threat to others must be made on a case-by-case basis and must not be based on generalizations, misperceptions, ignorance, irrational fears, patronizing attitudes, or pernicious mythologies.

The employer must identify the specific risk that the individual with a disability would pose. The standard to be used in determining whether there is a direct threat is whether the person poses a significant, risk to the safety of others or to property, not a speculative or remote risk, and that no reasonable accommodation is available that can remove the risk. See section 102(b)(5) requiring reasonable accommodation; *School Board of Nassau County* v.

Arline, 480 U.S. 273 (1987). For people with mental disabilities, the employer must identify the specific behavior on the part of the individual that would pose the anticipated direct threat. This determination must be based on the behavior of the particular disabled person, not merely on generalizations about the disability.

Making such a determination requires a fact-specific individualized inquiry resulting in a "well-informed judgment grounded in a careful and open-minded weighing of the risks and alternatives." *Hall* v. *U.S. Postal Service*, 857 F.2d 1073, 1079 (6th Cir. 1988), quoting *Arline*. See also *Mantolete* v. *Bolger*, 757 F.2d 1416 (9th Cir. 1985) and *Strathie* v. *Dept. of Transportation*, 716 F.2d 227 (3d Cir. 1983).

With respect to covered entities subject to rules promulgated by the Department of Transportation regarding physical qualifications for drivers of certain classifications of motor vehicles, it is the Committee's intent that a person with a disability applying for or currently holding a job subject to these standards must be able to satisfy any physical qualification standard that is job related and consistent with business necessity in order to be considered a qualified individual with a disability under title I of this legislation.

In light of this legislation, the Committee expects that within two years from the date of enactment (the effective date of title I of this legislation), the Secretary of Transportation will undertake a thorough review of these regulations to ascertain whether the standards conform with current knowledge about the capabilities of persons with disabilities and currently available technological aids and devices and whether such regulations are valid under this Act. The Committee expects that the agency will make any necessary changes within the two year period to bring such regulations into compliance with the law. (Of course, a non-discrimination obligation on the part of the Department of Transportation also exists currently under section 504 of the Rehabilitation Act of 1973.)

The Committee also notes that the federal government, in granting national security clearances, takes into account current or former drug or alcohol use in denying or terminating such clearances. The Committee recognizes that any function of an employment position that requires a security clearance is an essential function of the employment position.

Reasonable accommodation

The definition of "reasonable accommodation" in section 101(8) sets forth examples of types of accommodations that could ensure that a person with a disability will be able to perform the essential functions of a job. These include making existing facilities used by an employee or applicant readily accessible to and usable by an individual with a disability; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities. As set forth in the substantive section of the Act, of course, the legal obligation of an entity to provide such an accommodation is depending on whether the accommodation would impose an undue hardship on the enti-

ty's business. See section 102(5)(A). The term "undue hardship" is defined in section 101(9) and is discussed later in this report.

Specific forms of discrimination prohibited

As explained above, section 102(a) of the bill includes a general prohibition against discrimination on the basis of disability against a qualified individual with a disability. Section 102(b) of the bill describes specific forms of discrimination that are included within the prohibition of section 102(a).

Section 102(b)(1) of the legislation specifies that the term "discrimination" includes limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee.

Thus, covered entities are required to make employment decisions based on facts applicable to individual applicants or employees, and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

The Act is premised on the obligation of employers to consider people with disabilities as individuals and to avoid prejudging what an applicant or employee can or cannot do on the basis of that individual's appearance or any other easily identifiable characteristic, or on a preconceived and often erroneous judgment about an individual's capabilities based on "labeling" of that person as having a particular kind of disability.

For example, it would be a violation of this legislation if an employer were to limit the duties of an individual with a disability based on a presumption of what was best for such individual or based on a presumption about the ability of that individual to perform certain tasks. Similarly, it would be a violation for an employer to adopt separate lines of progression for employees with disabilities based on a presumption that no individual with a disability would be interested in moving into a particular job.

Employment activities must take place in an integrated manner. Employees with disabilities must not be segregated into particular work areas. Moreover, non-work activities offered by the employer should also be integrated, such as break-rooms or lunch rooms. If a break-room is located on the second floor of an existing building which is inaccessible, comparable amenities should be made available to the worker who uses a wheelchair on the first floor, such as a coffee pot, table, chairs for co-workers, refrigerator, etc. The actual size of the alternative break room does not have to be comparable, so long as the employee who uses a wheelchair has equivalent opportunities to other workers, including the opportunity to take a break or eat lunch with a co-worker.

It would also be a violation to deny employment to an applicant based on generalized fears about the safety of the applicant or higher rates of absenteeism. By definition, such fears are based on averages and group-based predictions. This legislation requires individualized assessments which are incompatible with such an approach. Often, group-based fears are erroneous as demonstrated in a study conducted in 1973 which examined the job performance, safety record and attendance of 1,452 physically impaired employees of the E.I. du Pont de Nemours and Company. See Wolfe, "Dis-

ability is No Hardship for du Pont". Various concerns that had been anticipated (such as concerns regarding safety and absenteeism) were disproved by the study. Indeed, the study showed that disabled workers performed as well as or better than the non-disabled co-workers.

In addition, employers may not deny health insurance coverage completely to an individual based on the person's diagnosis or disability. For example, while it is permissible for an employer to offer insurance policies that limit coverage for certain procedures or treatments, e.g., only a specified number of blood transfusions per year, a hemophiliac who exceeds this treatment limit may not be denied coverage for other conditions, such as for a broken leg or for heart surgery, because of the existence of the hemophilia. A limitation may be placed on reimbursements for a procedure or the types of drugs or procedures covered, e.g., a limit on the number of x-rays or non-coverage of experimental drugs or procedures; but, that limitation must apply to persons with or without disabilities. All people with disabilities must have equal access to the health insurance coverage that is provided by the employer to all employees.

The Act does not, however, affect pre-existing condition clauses included in insurance policies offered by employers. Thus, employers may continue to offer policies that contain preexisting condition exclusions, even though such exclusions adversely affect people with disabilities, so long as such clauses are not used as a subterfuge to evade the purposes of this legislation.

For additional explanations of the treatment of insurance under this legislation, see the discussion in the report on insurance under title V of the legislation.

Section 102(b)(2) of the legislation specifies that "discrimination" includes participating in a contractual or other arrangement or relationship that has the effect of subjecting the covered entity's qualified applicants or employees with disabilities to the discrimination prohibited by this title. Such relationships include a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs.

The phrase "the covered entity's" qualified applicants or employees was added to the Act in order to avoid any possible misunderstanding regarding this provision. This provision is intended to apply to a situation in which a covered entity enters into a contractual relationship with another entity, which has the effect of subjecting the first entity's *own* employees or applicants to discrimination. It does not apply to a situation in which a covered entity enters into a contractual relationship with another entity that is engaging in some form of discrimiantion against its own employees or applicants. The first entity has no liability in such a situation for the discrimination of the second entity. (Of course, the second entity may be separately liable to suit under this Act.)

Section 102(b)(2) further provides that a covered entity may not participate in a contractual relationship that has the effect of subjecting the covered entity's qualified applicants or employees *"to the discrimination prohibited by this title."* The basic intent of this provision is that any entity may not do through a contractual pro-

vision what it may not do directly. The type of discrimination prohibited is that "prohibited by this title"—i.e., that set forth in the substantive provisions of the bill. Thus, if the contractual relationship having the effect of discrimination occurs in any of the areas covered by the Act, for example, in hiring, training or promotion of employees, to the extent that the requirement of reasonable accommodation, and the limitation of "undue hardship," applies if the entity were acting directly, these requirements and limitations would apply as well when the entity is acting in a contractual relationship. The contractual relationship adds no new obligations in and of itself beyond the obligations imposed by the Act, nor does it reduce the obligations imposed by the Act.

For example, assume that an employer is seeking to contract with a company to provide training for the first entity's employees. Whatever responsibilities and limitations of reasonable accommodation that would apply to the employer if it provided the training itself would apply as well in the contractual situation. Thus, if the training company were planning to hold its program in a physically inaccessible location, thus making it impossible for an employee who used a wheelchair to attend the program, the employer would have a duty to consider various reasonable accommodations. These *could* include, for example, (1) asking the training company to identify other sites for the training that are accessible; (2) identifying other training companies that use accessible sites; (3) paying to have the training company train the disabled employee (either one-on-one or with other employees who may have missed the training for other reasons), or any other accommodation that might result in making the training available to the employee.

If no accommodations were available that would make the training program accessible, or if the only options that were available would impose an undue hardship on the employer, the employer would then have met its requirements under the Act. The Committee anticipates, however, that certainly some form of accommodation could be made such that the disabled employee would not be completely precluded from receiving training that the employer may consider necessary.

As a further example, assume that an employer contracts with a hotel for a conference held for the employer's employees. Under the Act, the employer has an affirmative duty to investigate the accessibility of a location that it plans to use for its own employees. Suggested approaches for determining accessibility would be for the employer to check out the hotel first-hand, if possible, or to ask a local disability group to check out the hotel. In any event, the employer can always protect itself in such situations by simply ensuring that the contract with the hotel specifies that all rooms to be used for the conference, including the exhibit and meeting rooms, be accessible in accordance with applicable standards. If the hotel breaches this accessibility provision, the hotel will be liable to the employer for the cost of any accommodation needed to provide access to the disabled individual during the conference, as well as for any other costs accrued by the employer. Placing a duty on the employer to investigate accessibility of places that it contracts for will, in all likelihood, be the impetus for ensuring that these types of contractual provisions become commonplace in our society.

Finally, as a last example, assume that a store is located in an inaccessible mall, and a disabled person wished to apply for a job in the store. The following approach would be followed. The store should take the person's application and determine if the person is qualified for the job. The question then becomes whether, with reasonable accommodation, the person can get to the job site. This reasonable accommodation, of course, has an undue hardship limitation.

Section 102(b)(2)(3) of the legislation specifies that "discrimination" includes utilizing standards, criteria, or methods of administration that have the effect of discrimination on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control.

Paragraphs 102(b)(2) and (3) of the legislation are derived from provisions that had been part of H.R. 2273 as originally introduced (which has now been superseded by the Substitute) and from general forms of discrimination that were set out in regulations implementing section 504 of the Rehabilitation Act of 1973 (see 45 CFR Part 84). The substitute, therefore, should not be construed as departing in any way from the concepts included in the original "general prohibitions" title of the ADA, as these concepts have been subsumed within the provisions of the subsequent titles of the legislation. Further, this legislation in no way is intended to diminish the continued viability of programs implementing the Javits-Wagner-O'Day Act.

Subparagraph 102(b)(3) incorporates a disparate impact standard to ensure that the legislative mandate to end discrimination does not ring hollow. This standard is consistent with the interpretation of section 504 by the U.S. Supreme Court in *Alexander* v. *Choate,* 469 U.S. 287 (1985). The Court in *Choate* explained that members of Congress made numerous statements during passage of section 504 regarding eliminating architectural barriers, providing access to transportation, and eliminating discriminatory effects of job qualification procedures. The Court then noted: "These statements would ring hollow if the resulting legislation could not rectify the harms resulting from action that discrimination by effect as well as by design." 469 U.S., at 297.

Section 102(b)(4) of the legislation specifies that "discrimination" includes excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.

Thus, assume, for example that an applicant applies for a job and discloses to the employer that his or her spouse has a disability. The employer believes the applicant is qualified for the job. The employer, however, assuming without foundation that the applicant will have to miss work or frequently leave work early or both, in order to care for his or her spouse, declines to hire the individual for such reasons. Such a refusal is prohibited by this subparagraph.

In contrast, assume that the employer hires the applicant. If he or she violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the spouse. The employer need

not provide any accommodation to the nondisabled employee. The individuals covered under this section are any individuals who are discriminated against because of their known association with an individual with a disability. This protection is not limited to those who have a familial relationship with the individual. Indeed, one of the amendments defeated by the Committee was an amendment that would have limited the provision to only certain associations and relationships.

Section 102(b)(5)(a) of the legislation specifies that discrimination includes the failure by a covered entity to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

The duty to make reasonable accommodations applies to all employment decisions, not simply to hiring and promotion decisions. This duty has been included as a form of non-discrimination on the basis of disability for almost fifteen years under section 501 and section 504 of the Rehabilitation Act of 1973 and under the nondiscrimination section of the regulations implementing section 503 of that Act.

The term "reasonable accommodation" is defined in section 101(8) of the legislation. The definition includes illustrations of accommodations that may be required in appropriate circumstances. The list is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation. Furthermore, the list is not meant to suggest that employers must follow all of the actions listed in each particular case. Rather, the decision as to what reasonable accommodation is appropriate is one which must be determined based on the particular facts of the individual case. This fact-specific, case-by-case approach to providing reasonable accommodations is generally consistent with interpretations of this phrase under sections 501, 503, and 504 of the Rehabilitation Act of 1973.

The first illustration of a reasonable accommodation included in the legislation is making existing facilities used by an employee readily accessible to and usable by an individual with a disability.

The legislation also specifies, as examples of reasonable accommodation, job restructuring, part-time or modified work schedules and reassignment to a vacant position.

Job restructuring means modifying a job so that a person with a disability can perform the essential functions of the position. Barriers to performance may be removed by eliminating nonessential elements of the job; redelegating assignments; exchanging assignments with another employee; and redesigning procedures for task accomplishment.

Part-time or modified work schedules can provide useful accommodations. Some people with disabilities are denied employment opportunities because they cannot work a standard schedule. For example, persons who need medical treatment may benefit from flexible or adjusted work schedules. A person with epilepsy may require constant shifts rather than rotation from day to night shifts. Other persons who may require modified work schedules are per-

sons with mobility impairments who depend on a public transportation system that is not currently fully accessible. Allowing constant shifts or modified work schedules provide ways of accommodating an individual with a disability to allow him or her to do the same job as a nondisabled individual. Reasonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer.

Reasonable accommodation may also include reassignment to a vacant position. If an employee, because of disability, can no longer perform the essential functions of the job that she or he has held, a transfer to another vacant job for which the person is qualified may prevent the employee from being out of work and employer from losing a valuable worker. Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered. The Committee also wishes to make clear the reassignment need only be to a vacant position—"bumping" another employee out of a position to create a vacancy is not required.

The section 504 regulations provide that "a recipient's obligation to comply with this subpart [employment] is not affected by any inconsistent term of any collective bargaining agreement to which it is a party." 45 CFR 84.11(c). The policy also applies to the ADA. Thus, an employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act. For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this Act.

The collective bargaining agreement could be relevant, however, in determining whether a given accomodation is reasonable. For example, if a collective bargaining agreement reserves certain jobs for employees with a given amount of seniority, it may be considered as a factor in determining whether it is a reasonable accommodation to assign an employee with a disability without seniority to the job. However, the agreement would not be determinative on the issue.

In other situations, the relevant question would be whether the collective bargaining agreement articulates legitimate business criteria. For example, if the collective bargaining agreement lists job duties, such a list may be taken into account in determining whether a given task is an essential function of the job. Again, however, the agreement would not be determinative on the issue.

Conflicts between provisions of a collective bargaining agreement and an employer's duty to provide reasonable accommodations may be avoided by ensuring that agreements negotiated after the effective date of this title contain a provision permitting the employer to take all actions necessary to comply with this legislation.

Additional forms of reasonable accommodation included in the legislation are acquisition or modification of equipment or devices. The Job Accommodation Network (JAN), operated by the President's Committee on Employment of People with Disabilities, reports that it is possible to accommodate many employees with relatively simple and inexpensive assistive technology. Since the service began in 1984, the Job Accommodation Network has accumulat-

ed a total of 16,585 available solutions from which businesses may draw. It currently handles about 500 cases per month. The toll free phone number for JAN is 800-526-7234.

For blind and visually-impaired persons, reasonable accommodations may include adaptive hardware and software for computers, electronics visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled material.

For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids, and telecommunication devices for deaf persons. For persons with limited physical dexterity, this may include goose neck telephone headsets, mechanical page turners, and raised or lowered furniture.

The Committee wishes to make it clear that personal use items, such as hearing aids or eyeglasses, are not included in this provision, and therefore are not required to be provided by employers as reasonable accommodations.

The legislation also lists appropriate adjustment or modifications of examinations, training materials or policies. For example, training sessions should be offered at accessible locations and materials should be made available in an accessible format.

The Committee wishes to emphasize again that this legislation does not require an employer to make any modification, adjustment, or change in a job description or policy that an employer can demonstrate would fundamentally alter the essential functions of the job in question.

The legislation also explicitly includes provision of qualified readers or interpreters as examples of reasonable accommodations. As with readers and interpreters, the provision of an attendant to assist a person with a disability during parts of the workday may be a reasonable accommodation depending on the circumstances of the individual case. Attendants may, for example, be required for traveling and other job-related functions. This issue must be dealt with on a case-by-case basis to determine whether an undue hardship is created by providing attendants.

The Committee wishes to clarify the employer's obligation to notify applicants and employees of the employer's obligation to provide a reasonable accommodation, who is entitled to an accommodation, when the duty to provide a reasonable accommodation is triggered, and the process of determining the appropriate accommodation.

First, pursuant to section 105 of the legislation, the employer must notify applicants and employees of its obligation under this legislation to make reasonable accommodations.

Second, section 102(b)(5)(a) of the legislation requires that reasonable accommodation be made for "an otherwise qualifed individual who is an applicant or employee . . ." The term "otherwise qualified" is used in this particular provision in order to clearly describe a person with a disability who meets all of an employer's job-related selection criteria except those criteria that he or she cannot meet because of a disability, but which could be met with a reasonable accommodation. See 45 CFR 84.12(a). This individual, who is "otherwise qualified" for the job, must then be offered the reasona-

ble accommodation that will then make the individual a "qualified individual with a disability" under this title.

For example, if a law firm requires that all incoming lawyers have graduated from an accredited law school and have passed the bar examination, the law firm need not provide an accommodation to an individual with a visual impairment who has not yet met these selection criteria. That individual is not yet eligible for a reasonable accommodation because he or she is not otherwise qualifed for the position.

On the other hand, if the individual graduated from an accredited law school and passed a bar examination (assuming that these are the only selection criteria), the person is "otherwise qualified" and the law firm would be required to provide a reasonable accommodation to the employee's visual impairment, such as a reader, that would enable the employee to perform the essential functions of the job as an attorney, unless the necessary accommodation would impose an undue hardship.

If, to continue the example, a part-time reader can be provided as a reasonable accommodation that permits the individual to perform the essential functions of the attorney position without imposing an undue hardship, the person is a "qualified individual with a disability" as defined in section 101(7) of the legislation and it would be unlawful not to hire the individual because of his or her visual impairment.

Third, the legislation clearly states that employers are obligated to make reasonable accommodations only to the "known" physical or mental limitations of an otherwise qualified individual with a disability. Thus, the duty to accommodate is generally triggered by a request from an applicant for employment or an employee. Of course, if a person with a known disability is having difficulty performing his or her job, it would be permissible for the employer to discuss the possibility of a reasonable accommodation with the employee.

In the absence of a request, it would be inappropriate to provide an accommodation, especially where is could impact adversely on the individual. For example, it would be unlawful to transfer unilaterally a person with HIV infection from a job as a teacher to a job where such person has no contact with students. See, e.g., *Chalk* v. *United States District Court*, 840 F.2d 701 (9th Cir. 1988).

The Committee believes that the reasonable accommodation requirement is best understood as a process in which barriers to a particular individual's equal employment opportunity are removed. The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.

The Committee suggests that, after a request for an accommodation has been made, employers first will consult with and involve the individual with a disability in deciding on the appropriate accommodation. The Committee recognizes that people with disabilities may have a lifetime of experience identifying ways to accom-

plish tasks differently in many different circumstances. Frequently, therefore, the person with a disability will know exactly what accommodation he or she will need to perform successfully in a particular job. And, just as frequently, the employee or applicant's suggested accommodation is simpler and less expensive than the accommodation the employer might have devised, resulting in the employer and the employee mutually benefiting from the consultation.

The Committee also recognizes that there are times when the appropriate accommodation is not obvious to the employeer or applicant because such individual is not familiar in detail with the manner in which the job in question is performed and the employer is not familiar enough with the individual's disability to identify the appropriate accommodation. In such circumstances, the Committee believes the employer should consider four informal steps to identify and provide an appropriate accommodation.

The first informal step is to identify barriers to equal opportunity. This includes identifying and distinguishing between essential and nonessential job tasks and aspects of the work environment of the relevant position(s). With the cooperation of the individual with a disability, the employer must also identify the abilities and limitations of the individual with a disability for whom the accommodation is being provided. The employer then should identify job tasks or work environment that limit the individual's effectiveness or prevent performance.

Having identified the barriers to job performance caused by the disability, the second informal step is to identify possible accommodations. As noted above, the search for possible accommodations must begin with consulting the individual with a disability. Other resources to consult include the appropriate State Vocational Rehabilitation Services agency, the Job Accommodation Network operated by the President's Committee on Employment of People With Disabilities, or other employers.

Having identified one or more possible accommodations, the third informal step is to assess the reasonableness of each in terms of effectiveness and equal opportunity. A reasonable accommodation should be effective for the employee. Factors to be considered include the reliability of the accommodation and whether it can be provided in a timely manner.

The Committee believes strongly that a reasonable accommodation should provide a meaningful equal employment opportunity. Meaningful equal employment opportunity means an opportunity to attain the same level of performance as is available to nondisabled employees having similar skills and abilities.

The final informal step is to implement the accommodation that is most appropriate for the employee and the employer and that does not impose an undue hardship on the employer's operation or to permit the employee to provide his or her own accommodation if it does impose an undue hardship. In situations where there are two effective accommodations, the employer may choose the accommodation that is less expensive or easier for the employer to implement as long as the selected accommodation provides meaningful equal employment opportunity.

The expressed choice of the applicant or employee shall be given primary consideration unless another effective accommodation exists that would provide a meaningful equal employment opportunity or unless the accommodation requested would pose an undue hardship.

The Committee wishes to note that many individuals with disabilities to not require any reasonable accommodation whatsoever. The only change that needs to be made for such individuals is a change in attitude regarding employment of people with disabilities.

The term "undue hardship" is defined in section 101(9) to mean an action requiring significant difficulty or expense, i.e., an action that is unduly costly, extensive, substantial, disruptive, or that will fundamentally alter the nature of the program. In determining whether a particular accommodation would impose an undue hardship on the operation of the covered entity's business, i.e., require significant difficulty or expense, factors to be considered include: (1) the overall size of the business of the covered entity with respect to number of employees, the number, type, and location of facilities operated by the covered entity, the overall financial resources of the covered entity and the financial resources of its covered facility or facilities involved in the provision of the reasonable accommodation; (2) the type of operation or operations maintained by the covered entity, including the composition and structure of the entity's workforce, in terms of such factors as functions of the workforce, geographic separateness, and administrative relationship, to the extent that such factors contribute to a reasonable determination of undue hardship; and (3) the nature and cost of the accommodation needed under the Act.

This provision is derived from and should be applied consistently with interpretations by Federal agencies applying the term set forth in regulations implementing sections 501 and 504 of the Rehabilitation Act of 1973.

The weight given to each factor in making the determination as to whether a reasonable accommodation constitutes an "undue hardship" will vary depending on the facts of a particular situation and turns on the nature and cost of the accommodation in relation to the employer's resources and operations. In explaining the "undue hardship" provision, the Department of Health, Education, and Welfare explained in the appendix accompanying the section 504 regulations (42 Fed. Reg. 22676 et seq., May 4, 1977):

> Thus, a small day-care center might not be required to expend more than a nominal sum, such as that necessary to equip a telephone for use by a secretary with impaired hearing, but a large school district might be required to make available a teacher's aide to a blind applicant for a teaching job. Further, it might be considered reasonable to require a State welfare agency to accommodate a deaf employee by providing an interpreter, while it would constitute an undue hardship to impose that requirement on a provider of foster home care services.

The mere fact that an employer is a large entity for the purposes of factor (1), should not be construed to negate the importance of factors (2) and (3) in determining the existence of undue hardship.

The Committee wishes to make it clear that the principles enunciated by the Supreme Court in *TWA* v. *Hardison,* U.S. 63 (1977) are not applicable to this legislation. In *Hardison,* the Supreme Court concluded that under title VII of the Civil Rights Act of 1964 an employer need not accommodate persons with religious beliefs if the accommodation would require more than a *de minimus* cost for the employer. By contrast, under the ADA, reasonable accommodations must be provided unless they rise to the level of "requiring significant difficulty or expense" on the part of the employer, in light of the factors noted in the statute—i.e., a significantly higher standard than that articulated in *Hardison.* This higher standard is necessary in light of the crucial role that reasonable accommodation plays in ensuring meaningful employment opportunities for people with disabilities.

Finally, the Committee wishes to make clear that even if there is a determination that a particular reasonable accommodation will result in an undue hardship, the employer must pay for that portion of the accommodation that would not cause an undue hardship if, for example, the State Vocational Rehabilitation Agency, other similar agency, or the employee or applicant pays for the remainder of the cost of the accommodation.

The specific factors added to section 101(9)(B) reflect concerns that were raised regarding covered entities that may operate separate, local facilities across the country. The addition of these factors reflects the Committee's intent that, in determining whether a reasonable accommodation would constitute an undue hardship, courts should look at and may weigh the financial resources and operations of those local facilities that are being asked to provide an accommodation, because the financial resources of local facilities of a covered entity may vary significantly. The factors further reflect the Committee's intent that, in determining whether a reasonable accommodation would constitute an undue hardship, the financial resources of the larger covered entity, and any of those financial resources available to the local covered facility from the larger covered entity, should be looked at and may be weighed by the court as well. As a general matter, and availability of financial resources from the covered entity to the facility should be considered in light of the interrelationship between the facility and the covered entity.

The additional factors also reflect the Committee's intent that, in considering the composition and structure of a covered entity's workforce, a court should consider such factors as the functions of the workforce, geographic separateness, and administrative relationship of such workforce to the covered entity, to the extent that such factors contribute to a reasonable determination of undue hardship. The Committee expects that a court will look at the practical realities of the situation, to determine how the workforce and resources of a covered entity and the facility interrelate. For example, a court may consider what other services and resources the covered entity provides to the local facility in the area of employee

benefits, services, and hiring in determining what resources are reasonably available to the facility.

The Committee also intends that the factors set forth in 101(9)(B) are not exclusive and that in appropriate circumstances courts and the administrative agencies may use other relevant factors whether or not those factors are identified in implementing regulations. For example, the number of employees or applicants potentially benefiting from an accommodation may be a relevant consideration in determining undue hardship where use by more than one person with a disability would reduce the relative financial impact of an accommodation. For example, a ramp installed for a new employee who uses a wheelchair not only benefits that employee but will also benefit mobility-impaired applicants and employees in the future. Assistive devices for hearing and visually-impaired persons may be shared by more than one employee so long as each employee is not denied a meaningful equal employment opportunity caused by limited access to the needed accommodation. On the other hand, the Committee wishes to make clear that the fact that an accommodation is used by only one employee should not be used as a negative factor counting in favor of a finding of undue hardship. By its very nature, an accommodation should respond to a particular individual's needs in relation to performance of a specific job at a specific location. It is not the Committee's intent that the individualized nature of the accommodation process be undermined when considering whether other employees may be benefited by an accommodation requested by a single individual.

A second factor the Committee believes should be considered is the availability of outside funding to pay for accommodations. Such Such funding may be available from a State vocational rehabilitation agency, or Federal, State or local tax deductions or tax credits. The Committee strongly believes that a covered entity should not be entitled to assert that the cost of an accommodation would impose an undue hardship on its business when it receives or is eligible to receive monies from an external source that would pay the entire cost of an accommodation. To the extent such monies pay or would pay for only part of the cost of an accommodation, only the non-reimbursed portion of the cost of an accommodation—the final net cost to the entity—may be considered in determining undue hardship. However, the lack of outside funding is not a defense to the obligation to provide a reasonable accommodation.

Finally, the Committee wishes to make it clear that even if there is a determination that a particular reasonable accommodation will result in an undue hardship, the employer must pay for the portion of the accommodation that would not cause an undue hardship if, for example, the applicant or employee pays for the remainder of the cost of the accommodation.

The second factor noted in subsection 101(9), for determining whether or not an accommodation would impose an undue hardship, focuses on the type of operation maintained by the entity. This would include, for example, consideration of the special circumstances incurred on certain types of temporary worksites common in the construction industry. For example, under some circumstances, it might fundamentally alter the nature of a construction site or be unduly costly to implement or maintain physical ac-

cessibility, for an applicant or employee who uses a wheelchair if, for example, the site's terrain and building structure change daily as construction progresses. The Committee recognizes that some accommodations that can easily be made in an office setting may impose an undue hardship in other settings. While the Committee believes that undue hardship standards may be developed on an industry by industry basis where particular types of operations common to an industry present special circumstances, the ultimate determination is a factual one which must be made on a case-by-case basis.

Section 102(b)(5)(b) of the legislation specifies that discrimination includes the denial of employment opportunities by a covered entity to an applicant or employee who is an otherwise qualified individual with a disability if the basis for such denial is because of the need of the individual for reasonable accommodation. This provision is derived directly from regulations issued under section 504. See 42 CFR 84.12(d).

The Section 504 regulation, and this provision, do not include the phrase "when such reasonable accommodation would not impose an undue hardship on such covered entity." However, it has always been understood under Section 504, and the Committee wishes to emphasize that this is its understanding under this Act, that the objection on the part of the covered *entity* to make a reasonable accommodation applies *only* when such accommodation would not impose an undue hardship (see section 102(b)(5)(a)). Because concerns have been raised that this provision could be misinterpreted to mean that there might be circumstances in which a covered entity would be required to provide a reasonable accommodation that *would* impose an undue hardship, the Committee wishes to emphasize that this has never been the case under Section 504 and is not the case under this Act. In addition, to eliminate any possible misunderstanding, the Committee has renumbered these provisions to read as subsets of the same provision, so that it is clear that the undue hardship limitation of 102(b)(5)(a) applies to 102(b), when the covered entity is expected to make the reasonable accommodation.

This provision, therefore should be applied just as it is applied under Section 504. That is, an employer cannot reject an applicant with a disability who requires a reasonable accommodation which, if provided by the covered entity, would not have imposed an undue hardship. In addition, even where an entity is not required under the law to pay for a reasonable accommodation, because it would have imposed an undue harship on the entity, the entity cannot refuse to hire a qualified applicant where the applicant is willing to make his or her own arrangements for the provision of such an accommodation, if the reason for the rejection is the need or the presence of the accommodation.

Section 102(b)(6) of the legislation specifies that discrimination includes using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

As in Section 504, the ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure the ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more correctly the inabilities, of persons with disabilities are still pervasive today. Every government and private study on the issue has shown that employers disfavor hiring persons with disabilities because of stereotypes, discomfort, misconceptions, and unfounded fears about increased costs and decreased productivity.

The three pivotal provisions to assure a fit between job criteria and an applicant's actual ability to do the job are:

(1) the requirement that individuals with disabilities not be disqualified because of their inability to perform non-essential or marginal functions of the job;

(2) the requirement that any selection criteria that screen out or tend to screen out individuals with disabilities be job-related and consistent with business necessity; and

(3) the requirement to provide reasonable accommodation to assist individuals with disabilities to meet legitimate criteria.

These three legal requirements, which are incorporated in sections 102(b)(5) and (6) of the legislation, work together to provide a high degree of protection to eliminate the current pervasive bias against employing persons with disabilities in the selection process.

The interrelationship of these requirements in the selection procedure is as follows: If a person with a disability applies for a job and meets all selection criteria except one that he or she cannot meet because of a disability, the criterion must concern an essential, non-marginal aspect of the job, and be carefully tailored to measure the person's actual ability to do this essential function of the job. If the criterion meets this test, it is nondiscriminatory on its face and it is otherwise lawful under the legislation. However, the criterion may not be used to exclude an applicant with a disability if the criterion can be satisfied by the applicant with a reasonable accommodation. A reasonable accommodation may entail adopting an alternative, less discriminatory criterion.

For example, in *Stutts* v. *Freeman,* 694 F.2d 666 (11th Cir. 1983), Mr. Stutts, who was dyslexic, was denied the job of heavy equipment operator because he could not pass a written test used by the employer for entering the training program, which was a prerequisite for the job. The written test had a disparate impact on persons with dyslexia. The legal issues presented were whether the written test for admission to the training program, and the reading requirements of the training program itself, were necessary criteria for the heavy equipment operator job. If the answers to both those questions were yes, the question then became whether a reasonable accommodation could enable the person with a disability to meet the employment criteria at issue.

In *Stutts,* the record reflected that Mr. Stutts could perform the job of heavy equipment operator. As stated by the court, "Indeed, everyone involved in this case seems to concede that Mr. Stutts

would have no problems doing the job but rather may experience difficulty with the outside reading requirements of the training program. If selected, this obstacle may be overcome by Mr. Stutts obtaining the assistance of someone to act as a 'reader'. . . . [T]o eliminate Mr. Stutts without implementing an alternative test (oral) administered by outside professionals of TVA's staff or by failing to adjust the entry requirements to accommodate his dyslexia, TVA has failed to comply with the statute." 694 F.2d at 669, n. 3.

Hence, the requirement that job selection procedures be "job-related and consistent with business necessity" underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the essential functions of the job, but that even if they do provide such a measure, a disabled applicant is offered a "reasonable accommodation" to meet the criteria that relate to the functions of the job at issue. It is critical that paternalistic concerns for the disabled person's own safety not be used to disqualify an otherwise qualified applicant. As noted, these requirements are incorporated in the legislation in sections 102(b)(1)(5) and (6).

The Committee intends that the burden of proof under each of the aforementioned sections be construed in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act as of June 4, 1989. See, e.g., 45 C.F.R. 84.13 (Department of Health and Human Services); 29 C.F.R. 1613.705 (Equal Employment Opportunity Commission); 28 C.F.R. 42.512 (Department of Justice); 29 C.F.R. 32.14 (Department of Labor).

Section 102(b)(7) of the legislation specifies that discrimination includes failing to select and administer tests so as best to ensure that, when the test is administered to an applicant or employee with a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the individual's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the individual's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

Section 102(c) of the legislation specifies that the prohibition against discrimination in section 101(a) applies to medical examinations and inquiries. Section 102(c)(2)(A) prohibits an employer from making any inquiries as to the existence or nature of an applicant's disability prior to an offer of employment. Section 102(c)(2)(B) makes it clear that an employer may make pre-employment inquiries into the ability of an applicant to perform job-related functions. Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities—particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer—before their ability to perform the job was even evaluated.

In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with a prohibition on pre-offer medical examinations or in-

quiries. The process established by the legislation parallels the regulations issued under section 504 of the Rehabilitation Act of 1973.

The legislation prohibits any identification of a disability by inquiry or examination at the pre-offer stage. Employers may ask questions which relate to the applicant's ability to perform job-related functions, but may not ask questions in terms of disability. For example, an employer may ask whether the applicant has a driver's license, if driving is an essential job function, but may not ask whether the applicant has a visual disability. This prohibition against inquiries regarding disability is critical to assure that bias does not enter the selection process.

The only exception to making medical inquiries is narrow. The legislation allows covered entities to require medical examinations after a conditional job offer has been made, so long as they are given to all entering employees in a particular category, the results of the examinations are kept confidential, and the results of such examinations are not used to discriminate against an individual with a disability unless such results make the individual not qualified for the job. As noted, the examinations must be given to all employees in a particular job category. For example, an entity can test all police officers rather than all city employees, or all construction workers rather than all construction company employees. This exception to the general rule meets the employer's need to discover possible disabilities that do, in fact, limit the person's ability to do the job, i.e., those that are job-related and consistent with business necessity.

A candidate, undergoing a post-offer, pre-employment medical examination may not be excluded, for example, solely on the basis of an abnormality on an x-ray. However, if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate, unless the employer could make a reasonable accommodation to the candidate's condition that would avert such harm and such accommodation would not cause an undue hardship.

However, the Committee would like to stress three important points. First, the assessment that there exists a high probability of substantial, harm must be strictly based on valid medical analyses. For example, back x-rays which reveal anomalies in asymptomatic persons usually have largely low predictive value. See Rockey, Fantel, and Omenn, *Discriminatory Aspects of Pre-employment Screening; Low Back x-ray Examination in the Railroad Industry*, 5 Am. J.L. of Med. 197, (1979). Therefore, employers should be diligent in assuring that their examining physicians make assessments based on testing measures that actually and reliably predict the substantial, imminent degree of harm required.

Second, any determination by a company physician can be challenged by evidence from the complainant's physician. Company doctors often are unfamiliar with certain disabilities and assume that there are barriers to employment which, in fact, do not exist. The complainant's own physician often has more knowledge about the effects of the disability on the individual being considered. An employer is not shielded from liability merely by a statement from

the employer's physician that a threat of imminent, substantial harm exists by hiring an applicant with a particular disability.

Third, employment decisions must not be based on paternalistic views about what is best for a person with a disability. Paternalism is perhaps the most pervasive form of discrimination for people with disabilities and has been a major barrier to such individuals. A physical or mental employment criterion can be used to disqualify a person with a disability only if has a direct impact on the ability of the person to do their actual job duties without imminent, substantial threat of harm. Generalized fear about risks from the employment environment, such as exacerbation of the disability caused by stress, cannot be used by an employer to disqualify a person with a disability. See, e.g., *Bentivenga* v. *U.S. Department of Labor,* 694 F.2d 623 (1982).

The Committee wishes to note the medical information obtained in an examination pursuant to 102(c)(3) may be used by the employer as baseline data to assist the employer in measuring physical changes attributable to on-the-job exposures.

Section 102(c)(4) prohibits medical exams of employees unless job-related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, even though a medical certificate may not be required by law. The Committee does not intend for this Act to override any medical standards or requirements established by Federal, State or local law as a prerequisite for performing a particular job, if the medical standards are consistent with this Act (or in the case of federal standards, if they are consistent with section 504)—that is, if they are job-related and consistent with business necessity. See, e.g., *Strathie* v. *Department of Transportation,* 716 F.2d 227 (3d Cir. 1983).

There are other instances in which medical examinations of employees may be permitted, provided the results of those examinations are not used to limit an employee's eligibility for employer-provided health insurance.

For example, several health standards promulgated pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 655) and the Federal Coal Mine Health and Safety Act of 1969 and the amendments thereto adopted in 1977 (30 U.S.C. 801 et seq.) require that employees exposed to certain toxic and hazardous substances be medically surveyed at specified intervals to determine if the exposures to those substances have had any negative effect on the employees.

The OSHA lead standard, for example, requires that employees exposed to lead be tested periodically to determine the lead level in

the employee's blood. If the test shows that lead levels exceed the permissible norm, the employee must be transferred from the exposed workplace to another worksite until the lead level falls below the permissible level. At that point, the employee may return to the original work station. It is the Committee's intention that these OSHA standards are valid under this section.

A growing number of employers today are offering voluntary wellness programs in the workplace. These programs often include medical screening for high blood pressure, weight control, cancer detection, and the like. As long as the programs are voluntary and the medical records are maintained in a confidential manner and not used for the purpose of limiting health insurance eligibility or of preventing occupational advancement, these activities would fall within the purview of accepted activities.

Once an employee is on the job, the actual performance on the job is, of course, the best measure of the employee's ability to do the job. When a need arises to question the continued ability of a person to do the job, the employer may make inquiries, and may require medical exams that are job-related and consistent with business necessity. The concept of "job-related and consistent with business necessity" has been outlined elsewhere in the report under the discussion of section 102(b)(6) of the legislation.

An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related. Testimony before the Committee indicated there still exists widespread irrational prejudice against persons with cancer. While the employer might argue that it does not intend to penalize the individual, the individual with cancer may object merely to being identified, independent of the consequences. As was made abundantly clear before the Committee, being identified as disabled often carries both blatant and subtle stigma. An employer's legitimate needs will be met by allowing those medical inquiries and examinations which are job-related and consistent with business necessity.

Consistent with the section in the legislation pertaining to pre-employment inquiries, it is the Committee's intent that a covered entity may invite applicants for employment to indicate voluntarily whether and to what extent they have a disability under the following circumstances only: (1) when a covered entity is taking remedial action to correct the effects of past discrimination, (2) when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited employment opportunities, or (3) when a recipient is taking affirmative action pursuant to section 503 of the Rehabilitation Act of 1973, provided that:

(a) the covered entity states clearly on any written questionnaire used for this purpose or makes clear orally (if no written questionnaire is used) that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts, and

(b) The covered entity states clearly that the information is being requested on a voluntary basis, that it will be kept confidential,

that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this title.

Defenses

Section 103(a) of the legislation specifies that, in general, it may be a defense to a charge of discrimination that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation as required under this title. The Committee has added the phrase "as required under this title," following the term "reasonable accommodation," to eliminate any possible misunderstanding that an entity might be required to provide a reasonable accommodation even if it imposed an undue hardship. The phrase "under this title," therefore, refers to a reasonable accommodation that would not impose an undue hardship on the covered entity, if the covered entity provided the accommodation, or a reasonable accommodation that the applicant or employee provided on his or her own, if the provision of such an accommodation would have imposed an undue hardship on the covered entity.

With respect to contagious diseases or infections, section 103(b) of the legislation specifies that the term "qualification standards" may include a requirement that an individual with a currently contagious disease or infection shall not pose a direct threat to the health or safety of other individuals in the workplace. Under this qualification standard, for a person with a currently contagious disease or infection to constitute a direct threat to the health or safety or others, the person must pose a significant risk of transmitting the infection to others in the workplace which cannot be eliminated by reasonable accommodation. See *School Board of Nassau County* v. *Arline,* 480 U.S. 273, 287, note 16. Thus, the term "direct threat" is meant to connote the full standard set forth in the *Arline* decision.

With respect to religious entities, section 103(c)(1) of the legislation specifies that title I does not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Thus, assume that a Mormon organization wishes to hire only Mormons to perform certain jobs. If a person with a disability applies for the job, but is not a Mormon, the organization can refuse to hire him or her. However, if two Mormons apply for a job, one with a disability and one without a disability, the organization cannot discriminate against the applicant with the disability because of that person's disability.

Because title I of this legislation incorporates by reference the definition of the term "employer" and "employee" used in title VII of the Civil Rights Act of 1964 and because of the similarity between the "religious preference" provisions in title VII and the ADA, it is the Committee's intent that title I of the ADA be inter-

preted in a manner consistent with title VII of the Civil Rights Act of 1964 as it applies to the employment relationship between a religious organization and those who minister on its behalf.

In addition, section 103(c)(2) of the legislation includes a provision not included in title VII of the Civil Rights Act of 1964. This provision specifies that a religious organization may require that all applicants and employees conform to the religious tenets of such organization. This exemption is modeled after the provision in title IX of the Education Amendments of 1972. Thus, it is the Committee's intent that the terms "religious organizations" and "religious tenets" be interpreted consistent with the Department of Education's regulations under title IX.

The inclusion of a "religious tenents" defense is not intended to affect in any way the scope given to section 702 of title VII of the Civil Rights Act of 1964.

Section 104 deals with employment of individuals who use illegal drugs or alcohol. Section 104(a) provides that a "qualified individual with a disability" does not include an employee or applicant who is a current user of illegal drugs, when the covered entity acts on the basis of such use. The phrase "when the covered entity acts on the basis of such use" is intended to make clear that if an adverse action is taken against a current user of illegal drugs who is otherwise disabled, to the extent the adverse action is taken on the basis of the disability still covered by the Act, the covered entity must comply with the Act and may not unjustly discriminate. However, if the action is taken on the basis of the current use of illegal drugs, the disabled person does not have protection simply by virtue of his or her disability. The Committee understands that this was the intent of the Senate in passing its version of section 104(a). See September 15, 1989, 135 Cong. Rec. S. 11224-5 (Statement by Senator Tom Harkin).

Section 104(b) provides that rehabilitated individuals and those in treatment who no longer use illegal drugs and individuals who are erroneously regarded as illegal drug users are not excluded from the definition of "individual with a disabiliity." In removing protection for persons who currently use illegal drugs, the Committee does not intend to affect coverage for individuals who have a past drug problem or are erroneously perceived as having a current drug problem. Coverage for these groups is, therefore, made explicit in section 104(b) because, under the standard Rehabilitation Act analysis, an individual with a past or perceived disability is protected only if the actual physical or mental condition at issue is itself a disability. Because the condition of current drug use is no longer a disabiliity for purposes of this Act, it is necessary to state that nothing in the exclusion of illegal drug use or addiction from the definition of disabiliity shall be construed to mean that persons with past or perceived illegal drug dependence conditions are necessarily denied coverage under the Act. Of course, as with all other disabilities, such plaintiffs must prove that they have a record of a disability, or are regarded as having a disability, as "disability" has been defined under section 504 and this Act (i.e., a physical or mental impairment that substantially limits a major life activity).

Section 104(b) also permits employers to conduct drug tests or take reasonable actions to ensure that an individual is no longer

using illegal drugs. This provision grants employers the same right as provided in section 104(d) to conduct drug tests on applicants and employees without violating this Act, but does not requires such testing. An employer may use other means to ensure that a person is no longer using drugs as long as those measures are reasonable. (See also the discussion on drug testing under section 104(d)).

Section 104(c) provides that a covered entity:

(1) may prohibit the use of alcohol or illegal drugs at the workplace by all employees;

(2) may require that employees not be under the influence of alcohol or illegal drugs at the workplace;

(3) may require that employees conform their behavior to requirements established pursuant to the Drug-Free Workplace Act of 1988;

(4) may hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual; and

(5) may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free workplace regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use, to comply with the standards established by such regulations.

With respect to the defense that transportation employers may require that transportation employees meet requirements established by the Secretary of Transportation pursuant to and consistent with Federal law, the Committee wishes to make the following clarifications.

First, licensing of motor carrier drivers and railroad engineers, and certification of airplane pilots involves consideration of drunk and drug-related driving convictions, as recorded by individual States and made available to employers through the National Drivers Register at the Department of Transportation. In addition, records of other drug or alcohol related violations of State or Federal law may be considered as indicators of "fitness for duty" for safety-sensitive transportation positions.

Second, this defense applies to violations of Department of Transportation regulations concerning drug and alcohol use outside the workplace, e.g., an air crew member who, in violation of Federal Aviation Administration rules, drinks alcohol within 8 hours of going on duty.

Third, this defense applies to actions based on an individual's failure to pass DOT mandated drug and alcohol tests when administered in accordance with Federal and State laws, e.g., a truck driver who tests positive for illegal drugs and the failure or refusal to take a drug test mandated by Department of Transportation regulations.

The Committee has expanded the provision of section 104(c) beyond transportation employees because of concerns regarding employees in sensitive positions. The Committee has therefore added a new provision, section 104(c)(5), providing that a covered

entity may require employees in sensitive positions, as defined by the Department of Transportation regulations regarding alcohol and drug use, the Department of Defense drug-free workplace regulations, and the Nuclear Regulatory Commission regulations regarding alcohol and drug use, to comply with the standards established by such regulations.

Section 104(d)(1) provides that a test to determine the use of illegal drugs is not considered a medical examination. The term "illegal drugs" is defined in section 101(5) and does not include drugs taken under supervision by a licensed health care professional. The exempted category includes, for example, experimental drugs taken under supervision. Many people with disabilities, such as people with epilepsy, AIDS, and mental illness, take a variety of drugs, including experimental drugs, under supervision by a health care professional. Discrimination on the basis of use of such drugs would not be allowed. Section 104(d)(2) further sepcifies that nothing in this title shall be construed to encourage, prohibit, or authorize conducting drug testing of job applicants or employees or making employment decisions based on such test results. Thus, nothing in this Act prohibits an employer from giving a test to any applicant or employee to determine the presence of illegal drugs and from refusing to hire the applicant or taking action against the employee if the test accurately detects the presence of illegal drugs. This is the case even if the applicant or employee who tests positive states that he or she recently stopped being a current drug user. The provision regarding drug testing for illegal drugs stands as an independent provision from the provision removing protection from individuals who are current users of illegal drugs.

The Committee believes that test results should be accurate and encourages covered entities to follow the Mandatory Guidelines on Federal Workplace Testing as issued by the Department of Health and Human Services. In any event, testing must comply with applicable Federal, State, or local laws or regulations regarding permitted testing, quality control, confidentiality, and rehabilitation; provided that, with respect to employees, as define by Department of Transportation, Department of Defense, and Nuclear Regulatory Commission regulations, if testing is undertaken, it must be done in compliance with applicable Federal laws and regulations.

Under section 104(d), applicants may be required to take a drug test before a conditional offer of employment has been given, and employees may be required to take a drug test without a showing that the test is job-related and consistent with business necessity, as is required under Section 102(c)(2-4) for other medical examinations. The Committee intends, however, that the application of this provision should not conflict with the right of individuals who take drugs under medical supevision not to disclose their medical condition before a conditional offer of employment has been given. See Sections 102(c)(2) and (3). Employers often use drug tests that detect the presence of a wide range of drugs, not simply illegal drugs. In addition, many legally prescribed medications taken under the supervision of a health care professional may register on a test as illegal drugs.

As noted above, however, section 102(c) prohibits the administration of a drug test, prior to a conditional offer of employment,

which would identify prescription drugs taken for disability. Section 102(c) is designed to ensure that, for example, a person who take dilantin is not identified as a person with epilepsy at early stages of the selection process.

In order to clarify what type of tests are allowed, therefore, the Committee has added the word "illegal" before the word "drugs" in section 104(d)(1), to provide that: "(A) test to determine the use of *illegal* drugs shall not be considered a medical examination." (The bill passed by the Senate stated that a test "to determine the use of drugs shall not be considered a medical examination.") Thus, if employers wish to conduct drug tests before a conditional offer of employment is made, they must be sure that the test is designed to accurately identify "illegal drugs," as defined under this Act.

Even if employers limit their tests to those that accurately identify illegal drugs, if the employer takes adverse action against an individual who tests positive on such a test, the individual can challenge the action on the grounds that the positive result was caused by medication taken under medical supervision. Individuals who take medication under medical supervision and those who are erroneously regarded as illegal drug users are protected against discrimination. See sections 101(1) and 104(b).

Employers may, of course, avoid some of these difficulties by giving the drug test after a conditional offer of employment. Because individuals who are current users of illegal drugs are not protected under this Act, if the test accurately detects the presence of illegal drugs, the employer can then withdraw the conditional offer of employment with no liability under the Act. Moreover, drug tests after conditional offers of employment will better conserve employers' financial resources by limiting the number of individuals undergoing such costly exams.

Under section 104, employers are permitted, but certainly are not required, to discipline or discharge employees who are current users of illegal drugs. Many employers have instituted employee assistance programs and give employees who have drug problems an opportunity to obtain assistance before being disciplined or terminated. Although the reasonable accommodation provision in section 102(b)(5) of this title does not require that a covered entity provide a rehabilitation program or an opportunity for rehabilitation for current users of illegal drugs (because current users of illegal drugs are not covered under the Act), employers have often found that it is more cost effective to rehabilitate qualified employees than to terminate them and hire new employees. The Committee endorses these efforts and strongly encourages employers to continue to offer or to initiate such rehabilitation programs rather than to terminate qualified employees with a current drug problem.

As noted, under section 104, employers may discipline or discharge employees who are current users of illegal drugs. Such employees are not protected under the ADA. The professional sports leagues have developed drug policies to deal with players who have current drug problems. The Committee has reviewed those policies because the leagues have raised questions as to whether such policies comply with the Act.

The Committee believes that the leagues' policies are in compliance with the requirements of this Act. The National Football

League permits its players to test positive on drug tests to enter a treatment program and not be disciplined on the first occasion. Players who test positive on a second occasion are permitted to receive treatment but are suspended for a 30-day period or until later deemed fit to return. After a third positive drug test a player is banned from play and is ineligible for reinstatement for at least one year. This policy is consistent with the Act.

The National Basketball Association permits players who voluntarily seek treatment for a current drug problem to obtain treatment without cost to the player on the first occasion without suffering any discipline. Players who are using drugs and do not seek treatment voluntarily and are subsequently detected are terminated for a minimum period of two years. Players who relapse and seek treatment on a second occasion are suspended but permitted to receive treatment and return when deemed fit. Players who relapse for a second time are dismissed and cannot seek reinstatement for at least two years. The decision to reinstate players in both the NBA and the NFL is based on an individualized determination that takes into consideration the player's satisfactory completion of a treatment program, conduct following the dismissal, including completion of any suspension period. This policy is consistent with the Act.

Finally, major league baseball gives players who use drugs and those who test positive on a drug test an opportunity to obtain treatment before being disciplined. Players who relapse are disciplined but are permitted to obtain treatment on a second occasion. This policy is consistent with the Act.

As noted, these drug policies are entirely consistent with the nondiscrimination provisions of the Act. The Committee recognizes the right of these and other sports leagues to maintain the integrity of professional sports through disciplinary procedures, including dismissal, and recognizes that these three leagues have established reasonable policies that provide a means for players to receive rehabilitation, and for appropriate discipline including termination.

In addition, it is consistent with the Act for leagues that wish to do so to dismiss players who illegally use drugs or who relapse again after an opportunity to obtain treatment, while providing an opportunity to petition for discretionary reinstatement after a specified time period, upon a showing of rehabilitiaton, which includes abstinence from the use of illegal drugs to the satisfaction of the appropriate league authority, as one factor in the overall circumstances.

The National Hockey League has adopted a different policy that is also consistent with the Act. The National Hockey League suspends players who are involved with illegal drugs and provides an opportunity for reinstatement within a year based on a showing of positive rehabilitative conduct.

The Act is not intended to disturb the legitimate and reasonable disciplinary rules and procedures established and enforced by professional sport leagues as described above that have been entered into between league management and its players' association.

Posting notices

Section 105 of the legislation specifies that every employer, employment agency, labor organization, or joint labor-management committee covered under this title must post notices in an accessible format to applicants, employees, and members describing the applicable provisions of this Act, in the manner prescribed by section 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–10).

Regulations

Section 106 of the legislation specifies that not later than one year after the date of enactment of this Act, the Equal Employment Opportunity Commission must issue regulations in an accessible format to carry out this title in accordance with subchapter II of chapter 5 of title 5, United States Code.

It is the Committee's intent that these regulations will be drafted so as to be a self-contained document. The regulations should not incorporate by reference other laws or regulations. The Commission's regulations will have the force and effect of law.

This format will increase the likelihood of voluntary compliance on the part of covered entities and should minimize the need to hire a battery of lawyers to ascertain the obligations created by this legislation.

Enforcement

Section 107(a) of the legislation specifies that the remedies and procedures set forth in sections 706, 707, 709, and 710 of the Civil Rights Act of 1964 shall be available with respect to the Commission, the Attorney General, or any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this legislation, or regulations promulgated under section 106 concerning employment. As has been the case under title VII of the Civil Rights Act of 1964, the Attorney General will continue to have pattern or practice authority with respect to State and local governments.

This provision reflects a change from the original H.R. 2273, which had provided as well the remedies available under section 1981 of the Civil Rights Act of 1866. An agreement was made that people with disabilities should have the same remedies available to all other minorities under Title VII of the Civil Rights Act of 1964.

Section 205 of H.R. 2273, as originally introduced, provided protection to individuals who believe that they are being or who are "about to be subjected to discrimination." This provision has been deleted because the Committee determined that the case law under title VII of the Civil Rights Act of 1964 already provides protection against discrimination in those circumstances with which the Committee had concerns, and thus, a specific provision in this title was unnecessary.

The Supreme Court has enumerated the "futile gesture" doctrine under title VII in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 365–67: "When a person's desire for a job is

not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." The Committee intends for this doctrine to apply to this title.

The term "is being subjected to discrimination" also includes the situation where the employee discovers that the employer is redesigning office space in such a way that it will become inaccessible to disabled employees or is restructuring its operations in a manner that is adverse to disabled employees. In these situations, an employee is allowed to bring a suit to stop the illegal construction or restructuring before it begins.

The Committee recognizes that this legislation's requirements are substantially different from the other statutes governing private sector employment that are enforced by the Commission. The fact that most of the Commission's current professional employees are unfamiliar with disability nondiscrimination requirements will necessitate that the Commission provide extensive training for staff.

The Committee expects the Commission will establish and implement employer training programs and otherwise provide technical assistance to employers seeking to comply with the legislation's requirements. The Act expressly provides that technical assistance shall be afforded to those with rights and responsibilities under this Act. (See Section 506.)

Sec. 107(b) provides that the agencies with enforcement authority for actions which allege employment discrimination under this title and under the Rehabilitation Act of 1973 shall develop procedures to ensure that administrative complaints filed under this title and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requiremetns under this title and the Rehabilitation Act of 1973. Section 107(b) further provides that such agencies shall establish such coordinating mechanisms in the regulations implementing this title and the Rehabilitation Act of 1973. The Committee added this provision specifically to address concerns raised by entities that will be covered under section 503 of the Rehabilitation Act (by virtue of receiving federal contracts in excess of $2,500) or under section 504 (by virtue of receiving federal financial assistance), as well as under this title. This provision is designed to ensure that such entities are not subject to a duplication of effort as they go through administrative and judicial proceedings, and are not subject in those proceedings to inconsistent or conflicting standards for the same requirements under this title and under the Rehabilitation Act.

Effective date

Section 108 of the legislation specifies that title I shall become effective 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

Title II of the legislation has two purposes. The first purpose is to make applicable the prohibition against discrimination on the basis of disability, currently set out in regulations implementing section 504 of the Rehabilitation Act of 1973, to all programs, activities, and services provided or made available by state and local governments or instrumentalities or agencies thereto, regardless of whether or not such entities receive Federal financial assistance. Currently, section 504 prohibits discrimination only by recipients of Federal financial assistance.

The second purpose is to clarify the requirements of section 504 for public transportation entities that receive Federal aid, and to extend coverage to all public entities that provide public transportation, whether or not such entities receive Federal aid.

Extending a Federal prohibition against discrimination on the basis of disability to all State and local governmental entities

Section 202 of the legislation extends the nondiscrimination policy in section 504 of the Rehabilitation Act of 1973 to cover all State and local governmental entities. Specifically, section 202 provides that no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination by a department, agency, special purpose district, or other instrumentality of a State or a local government.

The Committee has chosen not to list all the types of actions that are included within the term "discrimination", as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments. The Committee intends, however, that the forms of discrimination prohibited by section 202 be identical to those set out in the applicable provisions of titles I and III of this legislation. Thus, for example, the construction of "discrimination" set forth in section 102 (b) and (c) and section 302(b) should be incorporated in the regulations implementing this title. In addition, however, section 204 also requires that regulations issued to implement this section be consistent with regulations issued under section 504. Thus, the requirements of those regulations apply as well, including any requirements such as program access that go beyond titles I and III. In addition, activities which do not fit into the employment or public accommodations context are governed by the analogous section 504 regulations. For example, under this title, local and state governments are required to provide curb cuts on public streets. The employment, transportation, and public accommodation sections of this Act would be meaningless if people who use wheelchairs were not afforded the opportunity to travel on and between the streets. Finally, it is also the Committee's intent that section 202 also be interpreted consistent with *Alexander* v. *Choate,* 469 U.S. 287 (1985).

Issues regarding communication also arise under this title. Throughout the United States, state and local governments provide for emergency telephone number systems. These systems enable individuals to seek immediate assistance from police, fire, ambulance,

and other emergency services. In the event of an emergency, the ability to access an emergency system directly—often accessible by dialing 911—can mean the difference between life and death. Unfortunately, most of these systems nationwide remain inaccessible to hearing impaired and speech impaired individuals who use telecommunication devices for the deaf (TDD) to communicate by telephone. The result is both dangerous and alarming. For example, in one case in San Diego, California, a deaf woman died of a heart attack because the police did not respond when her husband tried to use his TDD to call 911. As part of its prohibition against discrimination in local and state programs and services, Title II will require local governments to ensure that these telephone emergency number systems are equipped with technology that will give hearing impaired and speech impaired individuals a direct line to these emergency services. While initially this will mean installation of a TDD or compatible ASCII or Baudot computer modems by programs operating these services, future technological advances—such as speech to text services—may offer other means of affording direct and equally effective access for these individuals.

The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute.

A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability—the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.

The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the result described above. Court cases interpreting section 504 have also rejected such reasoning. As the Tenth Circuit explained in *Pushkin* v. *Regents of University of Colorado,* 658 F.2d 1372, the fact that the covered entity lists a number of factors for the rejection, in addition to the disability, is not dispositive. In *Pushkin,* the University states that Dr. Pushkin was rejected because of low interview scores. The court stated that "it is not possible to extricate the mean ratings from the reactions to the handicap itself." 658 F.2d at 1386.

Moreover, the interview ratings "as a general practice are not necessarily controlling in the selection process." Id. at 1386. The

question was whether "the reasons articulated for the rejection other than handicap encompass unjustified consideration of the handicap itself" Id. at 1387. As stated by the court, the "issue is whether rejecting Dr. Pushkin after expressly weighing the implication of his handicap was justified." Id. at 1386.

In sum, the existence of non-disability related factors in the rejection decision does not immunize employers. The entire selection procedure must be reviewed to determine if the disability was improperly considered.

As used in this title, the term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modification to rules, policies and practices, the removal of architectural, communication, and transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services of the participation in programs or activities provided by a department, agency, special purpose district, or other instrumentality of a State or a local government.

The term "instrumentality of a state and local government" includes public transit authorities.

With regard to school bus operations by public entities, such operations shall be treated as demand-responsive operations. Agencies of a State, or a political subdivision of a State, that provide school bus transportation are required to provide bus service to children with disabilities equivalent to that provided to children without disabilities (whether provided directly or by contract or other arrangement with a private entity).

The school bus transportation provided to children with disabilities must be provided in the most integrated setting possible. This means that when a child with a disability requires transportation, the school bus that serves his/her route should be accessible. This does not mean that all school buses need to be accessible; it means that equal nonsegregated opportunities must be provided to all children. However, the lack of an accessible bus may never be used to limit the placement options of a student with a disability. For example, a student with a disability may not be precluded from attending the most integrated school because of the lack of transportation.

School bus operations, as defined in 49 CFR 605.3(b) and the associated revisions established in Highway Safety Program Standard No. 17, means transportation by Type I and II school bus vehicles of school children, personnel, and equipment to and from school or school-related activities.

Actions applicable to public transportation considered discriminatory

Definition

As used in title II, the term "public transportation" means transportation by bus or rail, or by any other conveyance (other than air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis, including service contracted through a private sector entity.

As used in title II, the term "public entity" includes the National Railroad Passenger Corporation.

The Committee excluded transportation by air because the Congress recently passed the Air Carrier Access Act, which was designed to address the problem of discrimination by air carriers and it is the Committee's expectation that regulations will be issued that reflect congressional intent. However, this title applies to the public entities' fixed facilities use in air travel, such as airport terminals, and to related services, such as ground transportation, provided by public entities.

It is not the Committee's intent to make the vehicle accessibility provisions of this title applicable to vehicles donated to a public entity. The Committee understands that it is not usual to donate vehicles to a public entity. However, there could be instances where someone could conceivably donate a bus to a public transit operator in a will. In such a case, the transit operators should not be prevented from accepting the gift.

The Committee does not intend that this limited exemption for donated vehicles be used to circumvent the intent of the ADA. For example, local transit authority could not arrange to be the recipient of donated inaccessible buses. This would be a violation of the ADA.

As a general rule, all requirements for nondiscrimination apply not only to the design of vehicles and facilities but to their operation as well. Thus, new fixed route buses must have lifts, and new and key stations must have elevators or other means to ensure accessibility as necessary components for a transit authority to be in compliance with the provisions of this title of the legislation. Merely installing the access equipment is never sufficient by itself, however; the lifts and elevators must also operate, be in good working order, and be available when needed for access in order for an entity to be in compliance with the law.

The Committee believes that a strong commitment from a transit authority's management team will ensure nondiscrimination in the provision of transportation to people with disabilities. This includes adequate training of maintenance personnel and bus operators, sensitivity training of all personnel which stresses the importance of providing transportation, and creative marketing strategies.

New buses, rail vehicles, and other fixed route vehicles

Section 203(b)(1) of the legislation specifies that it shall be considered discrimination, for purposes of this Act and for purposes of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public entity to purchase or lease a new fixed route bus of any size, a new intercity rail vehicle, a new light rail vehicle to be used for public transportation, or any other new fixed route vehicle to be used for public transportation and for which a solicitation by such individual or entity is made later than 30 days after the date of enactment of this Act, if such bus, rail, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

This requirement is included to ensure that an accessible transportation system is phased-in as new vehicles are purchased. It makes no sense, at this point in time, to perpetuate continued inaccessibility and to exclude persons with disabilities from the opportunity to use a key public service—transportation. Inaccessible ve-

hicles affect more than just individuals with disabilities' ability to travel independently. It affects their ability to gain employment. When such individuals are able to depend on an accessible transportation system, one major barrier is removed which could prevent them from joining the work force. This ability ultimately affects our society as a whole. Accessible transportation also allows individuals with disabilities to enjoy cultural, recreational, commercial and other benefits that society has to offer.

Transportation affects virtually every aspect of American life. Mainline services are geared to moving people to and from work, school, stores, and other activities on schedules that reflect most people's daily routines. It is false and discriminatory to suggest that people with disabilities—who have the same needs as other community residents—are not as interested in or worthy of using transit services as people without disabilities.

The term "fixed route" means a bus system that operates on a continuing and regular basis on a fixed pattern and schedule.

The term "new" means buses which are offered for first sale or lease after manufacture without any prior use. Buses for which a solicitation is made within 30 days after enactment of this legislation are not subject to the accessibility requirement and thus are not required to have wheelchair lift equipment. However, buses that are solicited for after 30 days from enactment of this legislation are covered by the accessibility provision and would have to comply with the requirement that all newly purchased vehicles be accessible to people with disabilities including wheelchair users.

The phrase "for which a solicitation by such individual or entity is made" means when a public entity asks for bids from manufacturers to build buses or begins to offer to purchase or bid for the purchase of new buses 30 days after enactment of this legislation.

The term "readily accessible to and usable by" is a term of art that means the ability of individuals with disabilities, including individuals using wheelchairs, to enter into and exit and safely and effectively use a vehicle used for public transportation.

Lifts or ramps and other equipment, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals using wheelchairs or other mobility aids; how many spaces per vehicle are to be made available for wheelchairs is, however, a determination that depends upon various factors, including the number of vehicles in the fleet, the seat vacancy rates, and usage of people with disabilities.

The Committee intends, consistent with these factors, that the determination of how many spaces must be available for wheelchair use should be flexible and generally left up to the provider, provided that at least some seats on each vehicle are accessible. Technical specifications and guidance regarding lifts and ramps, wheelchair spaces, and securement devices are to be provided in the minimum guidelines and regulations to be promulgated under this legislation. These minimum guidelines should be consistent with the Committee's desire for flexibility and decisionmaking by the provider.

The Committee wishes to emphasize that the legislation uses the phrase "including individuals who use wheelchairs" because of misinterpretations of the nature and extent of obligations under section 504. The obligation to provide public transportation in a nondiscriminatory fashion applies to all persons with disabilities, including people with sensory impairments and those with cognitive impairments such as mental retardation. It is the Committee's intent that the obligation to provide lift service applies, not only to people who use wheelchairs, but also to other individuals who have difficulty in walking. For example, people who use crutches, walkers or three-wheeled mobility aids should be allowed to use a lift.

A public transit authority should develop training sessions to familiarize bus operators with the services that individuals with disabilities may need. For example, assuring that people with vision impairments get off at the correct stop, training bus drivers how to use the lift in a bus, and developing a program which would assist people with mental retardation in how to use the transportation system. Transit authorities should also be required to have written materials available in a format accessible to people with vision impairments and to make TDD numbers available to persons with hearing and communication impairments.

Section 203(e) of the legislation provides temporary relief for public entities from the obligations under section 203(b) where lifts are unavailable. Specifically, with respect to the purchase of new buses, a public entity may apply for, and the Secretary of Transportation may temporarily relieve such entity from the obligation to purchase new buses of any size that are readily accessible to and usable by individuals with disabilities, if such public entity can demonstrate the existence of four factors:

(1) That the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) The unavailability from any qualified manufacturer of hydraulic, electro-mechanical, or other lifts for such new buses;

(3) That the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) That any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

Section 203(f) of the legislation makes it clear that any relief granted under subsection (e) must be limited in duration by a specified date. In addition, if, at any time, the Secretary of Transportation has reasonable cause to believe that such relief was fraudulently applied for, the Secretary of Transportation shall cancel such relief, if such relief is still in effect, and take other steps that he or she considers appropriate.

Further, the appropriate committees of the Congress must be notified of any such relief granted. The appropriate committees in the House include the Committee on Education and Labor and the Committee on Public Works and Transportation.

Used vehicles

Section 203(b)(2) of the legislation specifies that if a public entity purchases or leases a used vehicle after the date of enactment of this Act, such public entity shall make demonstrated good faith efforts to purchase or lease a used vehicle that is readily acessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The term "used vehicle" means a vehicle that was purchased before a date which is at least 30 days prior to the enactment of this legislation. Frequently small and rural communities do not purchase new buses. Many of these communities buy used buses that are less than new buses in an effort to provide transportation to individuals in these areas without expending large sums of money. Purchasers of used vehicles are required by this legislation to make "demonstrated good faith efforts" to locate accessible used vehicles.

The phrase "demonstrated good faith efforts" is intended to require a nationwide search and not a search limited to a particular region. For instance, it would not be enough for a transit operator to contact only the manufacturer where the transit authority usually does business to see if there are accessible used buses. It might involve the transit authority advertising in a trade magazine, i.e. Passenger Transport, or contacting the transit trade association, American Public Transit Association (APTA), to determine whether accessible used vehicles are available.

It is the Committee's expectation that as the number of buses with lifts increases, the burden on the transit authority to demonstrate its inability to purchase accessible vehicles despite good faith efforts will become more and more difficult to satisfy.

Remanufactured vehicles

Section 203(b)(3) of the legislation specifies that if a pubic entity remanufactures a vehicle, or purchases or leases a remanufactured vehicle, so as to extend its useful life for 5 years or more, the vehicle shall, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The phrase "remanufactures a vehicle or purchases or leases a remanufactured vehicle so as to extend its usable life for 5 years or more" means that the vehicle is stripped to its frame and is then rebuilt. It does not simply mean an engine overhaul. The additional cost to make a remanufactured vehicle accessible would be comparable to the cost of making a new vehicle accessible. Therefore, remanufactured vehicles should be treated the same as new vehicles.

The phrase "to the maximum extent feasible" is included in order to provide clarification that the Committee does not intend to require accessibility for remanufactured vehicles if it would destroy the structural integrity of the vehicle.

Paratransit as a supplement to fixed route public transportation system

Section 203(c) of the legislation specifies that if a public entity operates a fixed route public transportation system to provide public transportation, it shall be considered discrimination, for purposes of this Act and for purposes of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for a public transit entity to fail to ensure the provision of paratransit or other special transportation services sufficient to provide a comparable level of services as is provided to individuals using fixed route public transportation to individuals with disabilities, including individuals who use wheelchairs, who cannot otherwise use fixed route public transportation and to other individuals associated with such individuals with disabilities in accordance with service criteria established under regulations promulgated by the Secretary of Transportation unless the public transit entity can demonstrate that the provision of paratransit or other special transportation services would impose an undue financial burden on the public transit entity.

If the provision of comparable paratransit or other special transportation services would impose an undue financial burden on the public transit entity, such entity must provide paratransit and other special transportation services to the extent that providing such services would not impose an undue financial burden on such entity.

Regulations promulgated by the Secretary of Transportation to determine what constitutes an undue financial burden may include a flexible numerical formula that incorporates appropriate local characteristics such as population. Although the legislation mentions only population as an example of local characteristics that might be reflected in such a formula, other characteristics appropriate to consider include population density, level of paratransit services currently being provided in the area, residential patterns, and the interim degree of accessibility of fixed route transit service.

Notwithstanding the above provisions, the Secretary may require, at the discretion of the Secretary, a public transit authority to provide paratransit services beyond the amount determined by such formula.

It is the Committee's intent that any criteria developed by the Secretary regarding the "undue financial burden" proviso, including the use of a formula, be consistent with that portion of the *ADAPT* v. *Skinner* decision handed down on July 24, 1989 by the Third Circuit Court of Appeals concerning the three percent "safe harbor" provision. *ADAPT* v. *Skinner,* 881 F.2d 1184 (3d Cir. 1989).

The Committee recognizes that there will always be a need for paratransit services. Paratransit services must be available to individuals who are unable to ue mainline public transportation. By "unable to use" the committee means to include those individuals who cannot gain access to the public transportation systems. The reasons for this inability to access the transit system could be because of the nature and severity of the individual's physical or mental disability or because of other factors determined by the local community, such as the lack of curb cuts which would pre-

vent individuals with certain disabilities from traveling to a bus stop.

In developing the criteria that will be used to determine which individuals with disability are unable to use the transportation services, it is important to significantly involve organizations representing people with disabilties and individual consumers with disabilities. The Committee wishes to make it clear that criteria developed to determine eligibility for paratransit e.g., inability to use mainline transportation services shall not be used to prevent, limit, or otherwise exclude such individuals from using mainline services if they so choose.

The term "paratransit or other special transportation services" means a transportation system that is available to those individuals who are unable to use the transportation system available to other people. This has been characteristically provided by transit authorities or contracted out to private companies and uses small buses or vans. Usually, the service is demand responsive or door-to-door service.

The Committee does not intend to require a public transit authority to actually provide paratransit or other special transportation services if such services are provided by other entities serving the same geographical location as is served by the pubic transit authority providing the fixed route system. However, the Committee wishes to emphasize that the paratransit or other special transportation services provided must be consistent with the requirements set out in this legislation and a public transit entity must be ulitmately accountable for ensuring that the services are being provided in compliance with this legislation.

The following minimum service criteria should apply to special paratransit service systems that are used to supplement a fixed route accessible system:

(a) Eligibility. All persons with disabilities unable to use the fixed route vehicles and their companions shall be eligible to use the special service.

(b) Response time. The service should be provided to a person with a disability with a comparable response time that a person without a disability would receive.

(c) Restrictions or priorities based on trip purpose. There shall not be priorities or restrictions based on trip purpose on users of the special service.

(d) Fares. The fare for a trip charged to a user of the special service system shall be comparable to the fare for a trip of similar length, at a similar time of day, charged to a user of the fixed route service.

(e) Hours and days of service. The special service shall be available throughout the same hours of days as the fixed route service.

(f) Service area. The special service shall be available throughout the service area in which the fixed route service is provided. Service to points outside this service are served by extended express or commuter bus service shall be available to persons with disabilities in an accessible manner.

The term "comparable level of services" means that when all aspects of a transportation system are analyzed, equal opportunities to use the transportation system exist for all persons—individuals

with and without disabilities. The essential test to meet is whether the system is providing a level of service that meets the needs of persons with and without disabilities to a comparable extent.

For instance, if a person with a disability calls for a ride on a demand response system for the general public—and an accessible bus arrives within fifteen minutes—that is equal treatment if a person without a disability has to wait for the bus for an equivalent amount of time. However, if the bus arrives and it does not have a lift and one is needed, or if a disabled person has to wait considerably more time than a non-disabled person, then equal opportunity to use the demand responsive public transportation system is not being provided.

The term "other individuals associated with such individuals with disabilities" means the companions of those individuals who canot otherwise use fixed route bus service whether they are part of the person's family, or friends of the individual with a disability. For instance, if a father wanted to take his children to the zoo and paratransit services are the only means of transportation that father is qualified for, he should be allowed to take his children on the paratransit bus. He should not be relegated to the paratransit by himself while his children are required to take fixed route public transportation.

If a man and woman were dating and the woman could not otherwise use public fixed route transportation then they should be able to use the paratransit services to and from that date. Likewise, if an individual had out of town guests and one of the out of town guests cannot use the fixed route bus system and is qualified to use the paratransit services of the state where they are visiting, then everyone in the group should be allowed to use the paratransit service to go sightseeing.

The Committee intends that during the interim period in which substantial numbers of fixed route buses are not accessible, the public transit authorities form an advisory committee to ensure the participation of individuals with disabilities in the planning, development, and implementation stages of the transportation system. One way to do this is by instituting an advisory group. Careful consideration should be given to the composition of the advisory group and every effort should be made to have adequate representation from all elements of the disability community.

This advisory group is an essential component to the development of standards which must then appear in the authorities' transit plan. Cooperation between the disability community and the transit operators is imperative during the period of time in which the system will be in transition, from an inaccessible system to an accessible one.

The transition options chosen will depend, to a certain extent, on the system involved. Some systems will require the broadest use of the existing accessible buses. For instance, it may be advantageous for a small system to require that all the accessible buses be in service during both off-peak and peak hours and at regular intervals so as to provide some service to the most people. A larger system might choose to make key lines accessible or ensure that the feeder lines are accessible. In this way, the system will be pro-

viding meaningful transportation at least to a portion of the individuals that need the access of the system.

The mainline interim service agreed upon by the advisory Committee must be available throughout the regular service area and during the normal service hours. This service, to the extent feasible, must meet a number of criteria as to convenience and comparability to regular mainline service (e.g., no restriction as to trip purpose, wait, fares and travel time).

Regardless of the mainline accessible transportation that will be available, it is important that a paratransit service be in place to ensure adequate access in those areas where accessible mainline service cannot yet be achieved. It is equally as important to realize that paratransit will always be necessary for those individuals who for legitimate reasons are unable to use mainline accessible service.

The local transit authority must be sincere in its efforts to coordinate special services in the locality to meet the service standards. The paratransit services should meet the service criteria both during the transition phase and thereafter.

Community operating demand responsive systems for the general public

Section 203(d) of the legislation specifies that if a public entity operates a demand responsive system that is used to provide public transportation for the general public, it shall be considered discrimination, for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such public entity to purchase or lease a new vehicle, for which a solicitation is made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the general public.

The intent of the Committee is to provide flexibility for rural and small urban communities that only have a demand responsive system for everyone. These systems are available to people without disabilities as well as to those with disabilities. The Committee intends that the time delay between a telephone call to access the demand responsive system and the pick up of the individual is not to be greater because the individual needs a lift or ramp or other accommodation to access the vehicle.

The term "demand responsive service" means service where the individual must request transportation service before it is rendered. This fact distinguishes this type of service from fixed route service.

With fixed route service, no action is needed by an individual to initiate public transportation. If an individual is at a bus stop at the time the bus is scheduled to appear then that individual will be able to access the transportation system. With demand-responsive service, an additional step must be taken by the individual before he or she can ride the bus i.e., the individual must make a telephone call. In this type of service, the transit provider will know ahead of time whether or not an accessible vehicle is necessary. Therefore, all demand responsive vehicles need not be accessible as

long as the level of service provided to individuals with disabilities is equal to that provided to those without disabilities.

The phrase "when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the general public" means that when all aspects of a transportation system are analyzed, equal opportunities for each individual with a disability to use the transportation system must exist.

The Committee wishes to make it clear that the authority of the Secretary to grant temporary relief where lifts are unavailable applies to communities operating demand responsive as well as fixed route bus systems.

New facilities

Section 203(g) opf the legislation specifies that for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to build a new facility that will be used to provide public transportation services, including bus service, inter-city rail service, rapid rail service, commuter rail service, light rail service, and other service used for public transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The meaning of the key phrases used in this subsection are described subsequently in the section of the report pertaining to title III of the Act.

Alterations of existing facilities

Section 703(h) of the legislation specifies that, with respect to a facility or any part thereof that is used for public transportation and that is altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for such individual or entity to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

If such public entity is undertaking major structural alterations that affect or could affect the usability of the facility (as defined under criteria established by the Secretary of Transportation) such public entity shall also make any additional alterations that are necessary to ensure that, to the maximum extent feasible, a path of travel from a primary entrance, and a reasonable number of bathrooms, telephones, and drinking fountains serving such path of travel are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The key phrases used in this subsection are described subsequently under the section of the report concerning title III of the legislation.

Existing facilities

Section 203(i)(1) of the legislation specifies that with respect to existing facilities used for public transportation, it shall be consid-

ered discrimination, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), for the public entity to fail to operate such public transportation program or activity conducted in such facilities so that, when viewed in the entirety, it is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

This is the same standard that currently applies under section 504 regulations issued by the Department of Transportation.

The standards set out above do not apply to stations in intercity rail systems, and key stations in rapid rail, commuter rail and light rail systems. Such stations are governed by section 203(i)(3) of the legislation, which specifies that for purposes of this Act and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to make stations in intercity rail systems and key stations in rapid rail, commuter rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

Intercity rail systems, including the National Railroad Passenger Corporation, must be made accessible as soon as practicable, but in no event later than 20 years after the date of enactment. Key stations in rapid rail, and light rail systems must be made accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act, except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinarily expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

The Committee intends that the term "key stations" shall include stations that have high ridership, and stations that serve as transfer and feeder stations. The public transit authority shall develop a plan for complying with the requirement that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of this requirement.

The phrase "key stations" includes hig ridership stations since individuals with disabilities have the same travel objectives as individuals without disabilities. Stations may have high ridership because they are located in business and employment districts, cultural, educational, recreational and entertainment centers, or are transfer points from other modes of transportation.

In addition to high ridership stations, "feeder stations" should be designated as "key" because they generally are located in suburban areas. Making these stations accessible will provide individuals with disabilities who live in these areas the ability to commute.

Exactly what stations will be determined "key" is a decision best left to the local community. The Committee does not intend to mandate a process to identify "key stations" except that—in developing the criteria that will be used to determine which stations will be "key"—it is important to significantly involve organizations representing people with disabilities and individual consumers with disabilities.

It is the Committee's understanding the settlement agreements recently reached in New York City specifying approximately 38 particular stations out of over 465 stations in the system and in

Philadelphia where 11 out of approximately 53 stations on the high speed line and 31 out of approximately 172 commuter rail stations are to be considered "key stations" are in full compliance with the criteria and procedures set out above.

The phrase "as soon as practicable" is included in order to create an obligation to attain accessibility before the specified period of time has elapsed. It is the intent of this Committee that this requirement would prohibit a transit authority from delaying the installation of an elevator, if capital funds were available and the installation could otherwise be accomplished, just because the absolute time limit is not up.

The phrase "extraordinarily expensive structural change to or replacement of existing facilities" is intended to create a narrow exemption for the facilities where the only means of creating accessibility would be to raise the entire platform of a station or to install an elevator. The costs to accomplish these structural changes can be extremely costly.

In issuing regulations for the enforcement of this section, the Secretary of Transportation may prescribe a procedure for the resolution of disputes when a local rail transit operator and representatives of the disability community are unable to reach mutual agreement.

Intercity, rapid, light, and commuter rail systems

Section 203(i)(2) of the legislation specifies that with respect to vehicles operated by intercity, light, rapid and commuter rail systems, for purposes of this title and section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), it shall be considered discrimination for a public entity to fail to have at least one car per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in any event in no less than 5 years.

It is the Committee's expectation that the regulations issued by the Secretary of Transportation will ensure that the car that is accessible stops at an approrpiate place in the station that is level with the car and that signage is included to indicate where such car will stop.

Regulations

Section 204 of the legislation specifies that not later than one year after the date of enactment of this Act, the Attorney General shall promulgate regulations in an accessible format that implement this title (other than section 203), and such regulations shall be consistent with this title and with the coordinated regulations under part 41 of title 28 Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) except, with respect to "program accessibility", "existing facilities" and "communications", such regulations shall be consistent with applicable portions of regulations and analysis relating to Federally conducted activities under section 504 of the Rehabilitation Act of 1973 (part 39 of title 28 of the Code of Federal Regulations).

Section 204(b) of the legislation specifies that not later than one year after the date of enactment of this Act, the Secretary of Transportation shall promulgate regulations in an accessible format that includes standards applicable to facilties and vehicles covered under section 203.

Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

Enforcement

Section 205 of the legislation specifies that the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of any provisions of this Act, or regulations promulgated under section 204, concerning public services.

It is the Committee's intent that administrative enforcement of section 202 of the legislation should closely parallel the Federal government's experience with section 504 of the Rehabilitation Act of 1973. The Attorney General should use section 504 enforcement procedures and the Department's coordination role under Executive Order 12250 as models for regulation in this area.

The Committee envisions that the Department of Justice will identify appropriate Federal agencies to oversee compliance activities for State and local governments. As with section 504, these Federal agencies, including the Department of Justice, will receive, investigate, and where possible, resolve complaints of discrimination. If a Federal agency is unable to resolve a complaint by voluntary means, the Federal government would use the enforcement sanctions of section 505 of the Rehabilitation Act of 1973. Because the fund termination procedures of section 505 are inapplicable to State and local government entities that do not receive Federal funds, the major enforcement sanction for the Federal government will be referral of cases by these Federal agencies to the Department of Justice.

The Department of Justice may then proceed to file suits in Federal district court. As with section 504, there is also a private right of action for persons with disabilities, which includes the full panoply of remedies. Again, consistent with section 504, it is not the Committee's intent that persons with disabilities need to exhaust Federal administrative remedies before exercising their private right of action.

Effective date

In accordance with section 206 of the legislation, title II of the bill shall become effective 18 months after the date of enactment except that the provisions of the bill applicable to the purchase of new fixed route vehicles shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Section 504 of the Rehabilitation Act of 1973 prohibits Federal agencies and recipients of Federal financial assistance from discriminating against persons with disabilities. The purpose of title III of the legislation is to extend these general prohibitions against discrimination to privately operated public accommodations and to bring individuals with disabilities into the economic and social mainstream of American life. Title III fulfills these purposes in a clear, balanced, and reasonable manner.

Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation.

Title III also prohibits discrimination in public transportation services provided by private entities.

Definitions

The term "commerce" is defined in section 301(1) of the legislation to mean travel, trade, traffic commerce, transportation, or communication among the several States, or between any foreign country or any territory or possession and any State, or between points in the same State but through another State or foreign country.

The term "commercial facilities" is defined as facilities that are intended for non-residential use and whose operations will affect commerce. This term is discussed later in the report.

Section 301(3) of the legislation sets forth the definition of the term "public accommodation." The following privately operated entities are considered public accommodations for purposes of title III, if the operations of such entities affect commerce:

(1) An inn, hotel, motel, or other similar place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(2) A restaurant, bar, or other establishment serving food or drink;

(3) A motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(4) An auditorium, convention center, or lecture hall;

(5) A bakery, grocery store, clothing store, hardware store, shopping center, or other similar retail sales establishment;

(6) A laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other similar service establishment;

(7) A terminal used for public transportation;

(8) A museum, library, gallery, and other similar place of public display or collection;

(9) A park or zoo;

(10) A nursery, elementary, secondary, undergraduate, or postgraduate private school;

(11) A day care center, senior citizen center, homeless shelter, food bank, adoption program, or other similar social service center; and

(12) A gymnasium, health spa, bowling alley, golf course, or other similar place of exercise or recreation.

The twelve categories of entities included in the definition of the term "public accommodation" are exhaustive. However, within each of these categories, the legislation only lists a few examples and then, in most cases, adds the phrase "other similar" entities. The Committee intends that the "other similar" terminology should be construed liberally, consistent with the intent of the legislation that people with disabilities should have equal access to the array of establishments that are available to others who do not currently have disabilities.

For example, the legislation lists "golf course" as an example under the category of "place of exercise or recreation." This does not mean that only driving ranges constitute "other similar establishments." Tennis courts, basketball courts, dance halls, playgrounds, and aerobics facilities, to name a few other entities, are also included in this category. Other entities covered under this category include video arcades, swimming pools, beaches, camping areas, fishing and boating facilities, and amusement parks.

Similarly, although not expressly mentioned, bookstores, video stores, stationery stores, pet stores, computer stores, and other stores that offer merchandise for sale or rent are included as retail sales establishments.

The phrase "privately operated" is included to make it clear that establishments operated by Federal, State, or local governments are not covered by this title. Of course an establishment which is operated by a private entity and which is covered under this title, but which also receives Federal, State, or local funds is still covered by this title, as well as under any other applicable laws.

Only nonresidential facilities are covered by this title. For example, in a large hotel that has a residential apartment wing, the residential wing would be covered under the Fair Housing Act (42 U.S.C. secs. 3601 et seq., as amended), rather than by this title. The nonresidential accommodations in the rest of the hotel would be covered by this title.

Private schools, including elementary and secondary schools, are covered by this title. The Committee does not intend, however, that compliance with this legislation requires a private school to provide a free appropriate education or develop an individualized education program in accordance with regulations implementing section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104) and regulations implementing part B of the Education of the Handicapped Act (34 CFR Part 300). Of course, if a private school is under contract with a public entity to provide a free appropriate public education, it must provide such education in accordance with section 504 of the Rehabilitation Act and part B regulations of the Education of the Handicapped Act.

The terms "readily achievable" and "public transportation" are discussed elsewhere in this report.

Prohibition of discrimination by public accommodations

Section 302(a) of the legislation specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. "Full and equal enjoyment" does not encompass the notion that persons with disabilities must achieve the identical result or level of achievement of nondisabled persons, but does mean that persons with disabilities must be afforded equal opportunity to obtain the same result.

Section 302(b)(1) of the legislation specifies general forms of discrimination prohibited by this title. These provisions are consistent with the general prohibitions which were included in title I of H.R. 2273 as originally introduced. As explained previously in the report, the general prohibitions title has been deleted by the substitute. However, as explained above, deletion of the original title I does not indicate a rejection of the general anti-discrimination provisions. Rather, the general prohibitions of the original title I have been incorporated into the specific title.

Sections 302(b)(1)(A) (i), (ii), and (iii) of the legislation specify that it shall be discriminatory:

> To subject an individual or class of individuals on the basis of disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of an entity;
>
> To afford such an opportunity that is not equal to that afforded other individuals; or
>
> To provide such an opportunity that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with an opportunity that is as effective as that provided to others.

The intent of the contractual prohibitions of section 302(b)(1)(A) (i)–(iii) is to prohibit a public accommodation from doing indirectly through a contractual relationship, what it may not do directly. Thus, the "individual or class of individuals" referenced in section 302(b)(1)(A) (i)–(iii) has always been intended to refer to the clients and customers of the public accommodation that entered into a contractual arrangement. The section has never been intended to encompass the clients or customers of *other* entities. Thus, a public accommodation is not liable under this provision for discrimination that may be practiced by those with whom it has a contractual relationship, when that discrimination is not directed against its own clients or customers.

In order that the scope of the contractual prohibition be made clear, however, the Committee has added section 302(b)(1)(A)(iv) to the title which provides that:

> For purposes of section 302(b)(1)(A)(i)–(iii), the term "individual or class of individuals" refers to the clients or customers of the public accommodation that enters into the contractual, licensing or other arrangement.

This addition tracks a similar clarification in the statute which was made in title I of the Act. See section 102(b)(2).

Section 302(b)(1)(B) of the legislation specifies that goods, services, privileges, advantages, accommodations, and services shall be afforded to an individual with a disability in the most integrated setting appropriate to the need of the individual.

Section 302(b)(1)(C) of the legislation specifies that notwithstanding the exisence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

Taken together, these provisions are intended to prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Consistent with these standards, public accommodations are required to make decisions based on facts applicable to individuals and not on the basis of presumptions as to what a class of individuals with disabilities can or cannot do.

The Committee wishes to emphasize that these provisions should not be construed to jeopardize in any way the continued viability of separate private schools providing special education for particular categories of children with disabilities, sheltered workshops, special recreational programs, and other similar programs.

At the same time, the Committee wishes to reaffirm that individuals with disabilities cannot be denied the opportunity to particiapte in programs that are not separate or different. This is an important and over-arching principle of the Committee's bill. Separate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used in any way to restrict the participation of disabled persons in general, integrated activities.

For example, a blind person may wish to decline participating in a special museum tour that that allows persons to touch sculptures in an exhibit and instead tour the exhibit at his or her own pace with the museum's recorded tour. It is not the intent of this title to require the blind person to avail himself or herself of the special tour. The Committee intends that modified participation for persons with disabilities be a choice, not a requirement.

In addition, it would not be a violation of this title for an establishment to offer recreational programs specially designed for children with mobility impairments. However, it would be a violation of this title if the entity then excluded such children from other recreational services made available to nondisabled children, or required children with disabilities to attend only designated programs.

Providing services in the most integrated setting is a fundamental principle of the ADA. Historically, persons with disabilities have been relegated to separate and often inferior services. For example, seating for persons using wheelchairs is often located in the back of auditoriums. In addition to providing inferior seating, the patron in a wheelchair is forced to separate from family or friends during the performance.

At times, segregated seating is simply the result of thoughtlessness and indifference. At other times safety concerns are raised, such as requiring patrons to sit near theater exits because of perceived hazards in case of fire. The purported safety hazard is largely based on inaccurate assumptions and myths about the ability of people with disabilities to get around in such circumstances. People who use wheelchairs vary greatly (as does the general public) in their individual ability to move quickly or slowly. More "safety hazard" is created by a slow-moving ambulatory person than by a fast-moving wheelchair athlete.

A balance between the safety interest and the need to preserve a choice of seating for movie patrons who use wheelchairs has been accomplished under existing federal accessibility standards (UFAS. sec. 4.33.3) that have applied since 1984 to theaters, auditoriums and other places of assembly constructed with federal funds. These standards provide that wheelchair seating areas must be "dispersed throughout the seating area" and "located to provide lines of sight comparable to those for all viewing areas." Wheelchair areas are not restricted to areas "near an exit," but can be located in various parts of the theater so long as they "adjoin an accessible route that also serves as a means of egress in case of emergency."

The availability of a choice of seating is critical to assure that patrons with disabilities are not segregrated from family or friends. New construction must therefore provide a variety of seating options. In existing theaters, efforts should be made to increase seating options where readily achievable. If removal of seats is not readily achievable, at a minimum, the entity must modify rules and procedures to allow a non-disabled companion to sit with the person who uses a wheelchair, by providing, for example, a folding chair. Finally, it is critical that seating be available in the front of the audience for persons with hearing and vision impairments, including those who use wheelchairs.

Section 302(b)(1)(D) of the legislation specifies that an individual or entity shall not, directly, or through contractual or other arrangements, utilize standards or criteria or methods of administration that have the effect of discriminating on the basis of disability or that perpetuate the discrimination of others who are subject to common administrative control. This provision is identical to section 102(b)(3) of the bill, which was discussed previously in the report.

Section 302(b)(1)(E) of the legislation specifies that it shall be discriminatory to exclude or otherwise deny equal goods, services, privileges, advantages, and accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association. This provision is comparable to section 102(b)(4) of the legislation, which was discussed previously in the report. The term "entity" is included in this section because, at times, entities that provide services to, or are otherwise associated with people with disabilities, are subjected to discrimination as well.

Section 302(b)(1) includes general prohibitions restricting a public accommodation from discriminating against people with disabilities by denying them the opportunity to benefit from goods or services,

by giving them unequal goods or services, or by giving them different or separate goods or services. These general prohibitions are patterned after the basic, general prohibitions that exist in other civil rights laws that prohibit discrimination on the basis of race, sex, religion, or national origin.

In order not to discriminate against people with disabilities, however, certain steps must often be taken as well in order to ensure that an opportunity for individuals with disabilities to participate in the goods or services is effective and meaningful. Thus, section 302(b)(2) includes specific prohibitions against discrimination, which refer to such requirements as providing auxiliary aids, modifying policies, or making various types of physical access changes. Certain limitations have been incorporated into these obligations: for example, a public accommodation need not provide an auxiliary aid if doing so would impose an undue burden, and physical access changes to existing facilities need be made only if they are readily achievable.

It should be noted that the specific provisions, including the limitations in these provisions, control over the general provisions to the extent that there is any apparent conflict. This interaction between the specific and general prohibitions operates with regard to the contractual prohibition as well. Thus, in situations in which there is no limiting factor (cost or otherwise) when the entity acts directly, there is similarly no limiting factor when the entity acts indirectly through a contract. Similarly, when there is a limiting "factor" when the entity acts directly (e.g., the limitation of "undue burden" in providing auxiliary aids and services or the limitation of "readily achievable" for physical access changes in existing facilities), that same limitation applies if the entity is acting indirectly through a contractual relationship.

As noted, the reference to contractual arrangements is to make clear that an entity may not do indirectly through contractual arrangements what it is prohibited from doing directly under this Act. However, it should also be emphasized that this limitation creates no substantive requirements in and of itself. Thus, for example, a store located in an inaccessible mall or other building, which is operated by another entity, is not liable for the failure of that other entity to comply with this Act by virtue of having a lease or other contract with that entity. This is because, as noted, the store's legal obligations extends only to individuals in their status as its own clients or customers, not in their status as the clients or customers of other public accommodations. Likewise, of course, a covered entity may not use a contractual provision to reduce any of its obligations under this Act. In sum, a public accommodation's obligations are not extended or changed in any manner by virtue of its lease with the other entity. The Committee intends that implementing regulations be issued by the Attorney General that will specifically address this area.

Section 302(b)(2)(A)(i) of the legislation specifies that the term "discrimination" includes the imposition or application of eligibility criteria that screen out or tend ot screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown

to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered.

As explained above, it is a violation of this title to exclude persons with disabilities. For example, it would be a violation for a grocery store to impose a rule that no blind persons would be allowed in the store, or for a drugstore to refuse to serve deaf people. It also would be a violation for such an establishment to invade such individuals' privacy by trying to identify unnecessarily the existence of a disability—for example, for purposes of a credit application, by a department store inquiring whether an individual has epilepsy, has ever had been hospitalized for mental illness, or has any other disability.

Similarly, it can constitute a violation to impose critria that limit the participation of people with disabilities—for example, by requiring that individuals with Down syndrome only be seated at the counter, but not in the table-seating section of a diner.

It would also be a violation of this title to adopt policies which impose additional requirements or burdens upon people with disabilities that are not applied to other persons. Thus, it would be a violation for a theater or restaurant to adopt a policy specifying that individuals who use wheelchairs must be chaperoned by an attendant.

In addition, this subsection prohibits the imposition of criteria that "tend to" screen out an individual with a disability. This concept, drawn from current regulations under Section 504 (See, e.g. 45 C.F.R. 84.13), makes it discriminatory to impose policies or criteria that, while not creating a direct bar to individuals with disabilities, diminish such individuals' chances of participation.

Such diminution of opportunity to participate can take a number of different forms. If, for example, a drugstore refuses to accept checks to pay for prescription drugs unless an individual presents a driver's license, and no other form of identification is acceptable, the store is not imposing a criterion that identifies or mentions disability. But for many individuals with visual impairments, and various other disabilities, this policy will operate to deny them access to the service available to other customers; people with disabilities will be disproportionately screened out.

A public accommodation may, however, impose neutral rules and criteria that are necessary for the safe operation of its business. For example, a height limit for certain rides at an amusement park will screen out certain adults of short stature, but may still be a legitimate safety criterion. Safety criteria, however, must be based on actual risks and not on speculation, stereotypes, or generalizations about disability.

Section 302(b)(2)(A)(ii) of the legislation specifies that discrimination includes a failure to make reasonable modifications in policies, practices, and procedures when such modifications may be necessary to afford such goods, services, facilities, privileges, advantages, or accommodations unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.

Many physicians have developed areas of specialization. Nothing in this legislation is intended to prohibit such a physician from re-

ferring a patient with a disability to another physician if that patient is seeking treatment outside the doctor's specialization and if the doctor would make a similar referral for an individual without that disability. For example, a physician who specializes in treating burn victims could not refuse to treat the burns of a deaf individual because of that individual's deafness. However, that physician is not required to accept the deaf individual as a patient if the individual does not have burns. The physician would need only to provide other types of medical treatment to the burn victim if the physician provided such other treatments to nondisabled individuals.

Likewise, nothing in this legislation is intended to prohibit a physician from referring an individual with a disability to another physician if the physician would refer other, nondisabled individuals with the same presenting conditions to another physician, or if the disability itself creates specialized complications for the patient's health which the physician lacks the experience or knowledge to address.

Similarly, a drug rehabilitation clinic could refuse to treat a person who was not a drug addict but could not refuse to prohibit a physician from referring an individual with a disability to another physician if the physician would refer other, nondisabled individuals with the same presenting conditions to another physician, or if the disability itself creates specialized complications for the patient's health which the physician lacks the experience or knowledge to address.

Similarly, a drug rehabilitation clinic could refuse to treat a person who was not a drug addict but could not refuse to treat a person who was a drug addict simply because the patient tests positive for HIV.

A public accommodation which does not allow dogs must modify that rule for a blind person with a seeing-eye dog, a deaf person with a hearing-ear dog, or a person with some other disability who uses a service dog. Refusal to admit the dog in these circumstances is tantamount to refusing to admit the person who is in need of the dog. Moreover, a public accommodation may not require the person with the disability to be separated from the service, guide, or seeing-eye dog once inside the facility.

Section 302(b)(2)(A)(iii) of the legislation specifies that discrimination includes a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the goods, services, facilities, advantages, or accommodations being offered or would result in an undue burden.

The phrase "undue burden" is the limit applied under this title upon the duty of places of public accommodation to provide auxiliary aids and services. It is analogous to the phrase "undue hardship" used in the employment title of the Act and is derived from section 504 and regulations thereunder. The determination of whether the provision of an auxiliary aid or service imposes an undue burden on a business will be made on a case-by-case basis,

taking into account the same factors used for purposes of determining "undue hardship." (See previous discussion in the report.)

The fact that the provision of a particular auxiliary aid would result in a undue burden does not relieve the business from the duty to furnish an alternative auxiliary aid, if available, that would not result in such a burden.

The term "auxiliary aids and services" is defined in section 3(1) of the legislation. The definition includes illustrations of aids and services that may be provided. The list is not meant to be exhaustive; rather, it is intended to provide general guidance about the nature of the obligation.

The Committee expects that the public accommodation will consult with the individual with a disability before providing a particular auxiliary aid or service. Frequently, an individual with a disability requires a simple adjustment or aid rather than an expensive or elaborate modification often envisoned by a public accommodation.

For example, auxiliary aids and services for blind persons include both readers and the provision of brailled documents (see below). A restaurant would not be required to provide menus in braille if it provided a waiter or other person who was willing to read the menu. Similarly, a bookstore need not braille its price tags, stock brailled books, or lower all its shelves so that a person who uses a wheelchair can reach all the books. Rather, a salesperson can tell the blind person how much an item costs, make a special order of brailled books, and reach the books that are out of the reach of the person who uses a wheelchair.

The legislation specifies that auxiliary aids and services includes qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments. Other effective methods may include: telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for the deaf, closed captions, and decoders.

For example, it would be appropriate for regulations issued by the Attorney General to require hotels of a certain size to have decoders for closed captions available or, where televisions are centrally controlled by the hotel, to have a master decoder.

It is also the Committee's expectation that regulations issued by the Attorney General will include guidelines as to when public accommodations are required to make available portable telecommunication devices for the deaf. In this regard, it is the Committee's intent that hotel and other similar establishments that offer nondisabled individuals the opportunity to make outgoing calls, on more than an incidental convenience basis, will provide a similar opportunity for hearing impaired customers and for customers with communication disorders to make such outgoing calls by making available a portable telecommunication device for the deaf.

It is not the Committee's intent that individual retail stores, doctors' offices, restaurants or similar establishments must have telecommunications devices for the deaf since people with hearing impairments will be able to make inquiries, appointments, or reservations with such establishments through the relay system established pursuant to title IV of the legislation, and the presence of a

public telephone in these types of establishments for outgoing calls is incidental.

Open-captioning, for example, of feature films playing in movie theaters, is not required by this legislation. Filmmakers, are, however, encouraged to produce and distribute open-captioned versions of films, and theaters are encouraged to have at least some pre-announced screenings of a captioned version of feature films.

Places of public accommodations that provide films and slide shows to impart information are required to make such information accessible to people with disabilities.

The legislation also specifies that auxiliary aids and services include qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments. Additional examples of effective methods of making visually delivered materials available include audio recordings and the provision of brailled and large print materials.

The legislation specifies that auxiliary aids and services include the acquisition or modification of equipment or devices. For example, a museum that provides audio cassettes and cassette players for an audio-quided tour of the museum may need to add brailled adhesive labels to the buttons on a select number of the tape-players so that they can be operated by a blind person.

The Committee wishes to make it clear that technological advances can be expected to further enhance options for making meaningful and effective opportunities available to individuals with disabilities. Such advances may require public accommodations to provide auxiliary aids and services in the future which today would not be required because they would be held to impose undue burdens on such entities.

Indeed, the Committee intends that the types of accommodation and services provided to individuals with disabilities, under all of the titles of this bill, should keep pace with the rapidly changing technology of the times. This is a period of tremendous change and growth involving technology assistance and the Committee wishes to encourage this process. (See, for example, the enactment in 1988 of P.L. 100-407, the Technology Related Assistance for Individuals with Disabilities Act). Information exchange is one of the areas where there are still substantial barriers, but where great strides are being made. Access to time sensitive print information, whether in the press or in government documents (such as notices of grants and contracts in the Federal Register or the Commerce Daily) is one of the cornerstones of our free society and of equal opportunity and access. It is not coincidental that access to information was the first guarantee extended by the Bill of Rights.

For these reasons, the Committee expects the Federal agencies charged with the implementation of this Act to take special interest in being aware of the possibilities relating to information dissemination and to make special efforts to share this information through technical assistance programs. Programs such as the Newspapers for the Blind Program in Flint, Michigan, a program which has been nationally recognized and is in the process of being emulated, provide an excellent example of what can be done in this area.

Section 302(b)(2)(A)(iv) of the legislation specifies that discrimination includes a failure to remove architectural barriers and communication barriers that are structural in nature in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable.

The Committee was faced with a choice in how to address the question of what actions, if any, a public accommodation should be required to take in order to remove structural barriers in existing facilities and vehicles. On the one hand, the Committee could have required retrofitting of all existing facilities and vehicles to make them fully accessible. On the other hand, the Committee could have required that no actions be taken to remove barriers in existing facilities and vehicles.

The Committee rejected both of these alternatives and instead decided to adopt a modest requirement that public accommodations make structural changes or adopt alternative methods that are "readily achievable."

The phrase "readily achievable" is defined in section 301(5) to mean actions that are easily accomplishable and able to be carried out without much difficulty or expense. In determining whether an action is readily achievable, factors to be considered include:

(1) The overall size of the business of a covered entity with respect to number of employees; the number, type, and location of its facilities; the overall financial resource of the entity and the financial resources of its facility or facilities involved in the removal of the barrier;

(2) The type of operation or operations maintained by a covered entity, including the composition and structure of the workforce, in terms of such factors as functions of the workforce, geographic separateness and administrative relationship to the extent that such factors contribute to a reasonable determination of readily achievable; and

(3) The nature and cost of the action needed.

As in the employment title, the specific factors added to section 302(5) reflect concerns that were raised regarding public accommodations that may operate separate, local facilities across the country. The Committee's discussion in title I regarding the addition of these factors applies to this title as well.

It is important to note that readily achievable is a significantly lesser or lower standard than the "undue burden" standard used in this title and the "undue hardship" standard used in title I of this legislation. Any changes that are not easily accomplishable and are not able to be carried out without much difficulty or expense when the preceding factors are weighed are not required under the readily achievable standard, even if they do not impose an undue burden.

The concept of readily achievable should not be confused with the term "readily accessible" used in regard to accessibility requirements for alterations (section 302(b)(2)(A)(vi)) and new construction (section 303). While the word "readily" appears in both phrases and has roughly the same meaning in each context—i.e.,

easily, without much difficulty—the concepts of "readily achievable" and "'readily accessible" are sharply distinguishable and represent almost polar opposites in focus.

The phrase "readily accessible to and usable by individuals with disabilities" focuses on the person with a disability and addresses the degree of ease with which an individual with a disability can enter and use a facility; it is access and usability which must be "ready."

"Readily achievable," on the other hand, focuses on the business operator and addresses the degree of ease of difficulty of the business operator in removing a barrier; if barrier-removal cannot be accomplished readily, then it is not required.

What the "readily achievable" standard will mean in any particular public accommodiation will depend on the circumstances, considering the factors listed previously. The kind of barrier removal which is envisioned, however, includes the addition of grab bars, the simple ramping of a few steps, the lowering of telephones, the addition of raised letter and braille markings on elevator control buttons, the addition of flashing alarm lights, and similar modest adjustments.

This section may require the removal of physical barriers, including those created by the arrangement of location of such temporary or movable structures as furniture, equipment, and display racks. For example, a restaurant may need to rearrange tables and chairs, or a department store may need to adjust its layout of display racks and shelves, in order to permit access to individuals who use wheelchairs, where these actions can be carried out without much difficulty or expense.

The purpose of this provision is to provide individuals with disabilities access to a representative selection of merchandise available in a department. The Committee does not intend that a department store separate each and every display fixture in order to provide wheelchair clearance maneuverability. It is sufficient if a customer who uses a wheelchair is able to determine, once in a department, that the store offers, for example, black leather jackets. Once that is determined, the customer can rely upon a salesperson to retrieve a black leather jacket in the cutomer's size.

A public accommodation would not be required to provide physical access if there is a flight of steps which would require extensive ramping or an elevator. The readily achievable standard only requires physical access that can be achieved without extensive restructuring or burdensome expense.

In small facilities like single-entrance stores or restaurants, "readily achievable" changes could involve small ramps, the installation of grab bars in restrooms in various sections and other such minor adjustments and additions.

Section 302(b)(2)(A)(v) of the legislation specifies that where an entity can demonstrate that removal of a barrier is not readily achievable, discrimination includes a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

With respect to the adoption of alternative methods, examples of "readily achievable" include: coming to the door to receive or

return dry cleaning; allowing a disabled patron to be served beverages at a table even though nondisabled persons having only drinks are required to drink at the inaccessible bar; providing assistance to retrieve items in an inaccessible location; and rotating movies between the first floor accessible theater and a comparable second floor inaccessible theater and notifying the public of the movie's location in any advertisements.

Section 302(b)(2)(A)(vi) of the legislation specifies that discrimination includes, with respect to a facility or part thereof that is altered by, on behalf of, for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make the alterations in such a manner that, to the maximum extent feasible, the altered portion of the facility is readily accessible to and usable by individual with disabilities.

Where the entity is undertaking an alteration that affects or could affect the usability of or access to an area of the facility containing a primary function, the entity must also make the alternations in such manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area, are readily accessible to and usable by individuals with disabilities, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under the criteria established by the Attorney General).

Under the language of section 302(b)(2)(A)(vi), an "alteration that affects or could affect usability of or access to an area of the facility containing a primary function" triggers an obligation to provide an accessible path of travel to the altered area, and to make bathrooms, telephones, and drinking fountains serving the altered area accessible. That such alternations must or could affect usability means that minor changes such as painting or papering walls, replacing ceiling tiles, and similar alterations that do not affect usability or access do not trigger the requirement that the altered areas must be made accessible or that the path of travel and bathrooms and other facilities must be made accessible.

Changes to floors may or may not affect accessibility or usability, depending upon the nature of the change involved. Routine maintenance, reparing and sanding floors, and other minor changes to floor surfaces would generally not affect usability and accessibility. Likewise, laying carpets or linoleum would ordinarily not affect usability and access. Such changes to floor surface would affect accessibility, however, if they were done in such a manner or made use of such materials as to result in a surface that is too slippery, spongy, uneven, not securely fastened down, having too-deep or too-wide channels, or otherwise creating a hazard or barrier to access by persons who use wheelchairs or have other mobility, visual or medical impairments. Laying of carpets and other floor coverings may not be done in such a manner as to make an otherwise accessible area inaccessible.

Other changes to floors, such as totally replacing a floor or installing a brick or stone floor, may be so substantial an undertaking and so connected to usability and accessibility as to trigger the requirement that the altered area be made accessible and that the

path of travel and bathrooms be made accessible if they occur in "an area of the facility containing a primary function." Under the statutory language, the latter obligations will occur only to the extent that they are not disproportionate to the overall alterations in terms of cost and scope.

Areas containing primary functions refer to those portions of a place of public accommodations where significant goods, services, facilities, privileges, advantages, or accommodations are provided. It is analogous to the concept in existing Uniform Federal Accessibility Standards (UFAS) of "the rooms or spaces in a building or facility that house the major activities" (UFAS 3.5). A mechanical room, boiler room, supply storage room, or janitorial closet is clearly not an area containing a primary function; the customer services lobby of a bank, the dining area of a cafeteria, the meeting rooms in a conference center, and the viewing galleries of a museum are areas containing a primary function.

The statute requires that when primary functional areas or places of public accommodation are altered in a manner that affects or could affect the usability or accessibility of the area, an accessibility path of travel and restrooms, telephones, and drinking fountains serving the altered area must be made accessible, if doing so would not be "disproportionate in terms of cost and scope to the overall alteration." This language sets out an expectation that an accessible path of travel and accessible facilities should generally be included when alternations are done to primary functional areas, unless achieving such accessibility would be out or proportion to the overall alteration being undertaken.

The disproportionality concept recognzies that, in some circumstances, achieving an accessible path of travel and accessible restrooms, telephones, and drinking fountains may be sufficiently significant in terms of cost or scope in comparison to the remainder to the alteration being undertaken as to render this requirement unreasonable. In such cases, where the tail (path of travel, accessible restrooms, etc.) would be wagging the dog (the overall alteration), the accessible path of travel and related accessibility features are not required.

Of course, a place of public accommodation may not evade the path of travel, accessible restrooms, etc., requirements by performing a series of small alterations which it would otherwise have performed as a single undertaking. The Committee notes that in Pennsylvania, a state statute requires that any series of alteration projects on a facility conducted within three years is combined as if they were a single alteration for purposes of determining the extent of accessibility requirements (71 Purdon's Pa. Stats. Ann. sec. 1455.1c (1989 Cum. Supp.)). Likewise, under the ADA, if a public accommodation has completed an alteration without incorporating an accessible path of travel and accessible restrooms, etc., the total costs of the alterations both past and future which are proximate in time may appropriately be considered in determining whether providing an accessible path of travel, restrooms, etc. is disproportionate.

If the aggregate cost of an accessible path of travel, restrooms, telephones, and drinking fountains would be disproportionate to the overall alteration cost, the place of public accommodation is

not relieved of the obligation to provide a subset of such features that is not disproportionate. The goal is to provide a maximum degree of accessibility in such features without exceeding the disproportionality limit. If a selection must be made between accessibility features, those which provide the greatest use of the facility should be selected. For example, an accessible entrance would generally be the most important path of travel feature, since without it the facility will be totally unusable by many persons with disabilities. An accessible restroom would have greater priority than an accessible drinking fountain.

If there is no way to provide an accessible path of travel to an altered area because of the disproportionality limit, making restrooms, etc. serving the area accessible is still required if it is not disproportionate. It is incorrect to assume that if a building entrance has steps, there is no reason to make the restrooms and other features accessible. Some individuals with disabilities can negotiate steps but still need accessibility features in the restroom, drinking fountains, etc. If those contemplating alterations to places of public accommodation are unsure how to rank such accessibility features in particular circumstances, they would be well-advised to consult with local organizations representing persons with disabilities.

The parameters of the concept of disproportionality will be established in the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board and in the alteration project. For example, it would clearly be disproportionate to require a public accommodation to double the cost of a planned alteration. Indeed, the Committee believes that, in almost all circumstances, it would be disproportionate to increase the cost of an alteration by more than 50% to incorporate an accessible path of travel and related accessibility features. The Committee notes that Pennsylvania statutes incorporate a formula under which an accessible path of travel is mandated whenever an alteration projects costs between 30 percent and 50 percent of the worth of the building, and the entire building must be made accessible if the remodeling exceeds 50 percent of the building's value (71 Purdon's Pa. Stats. Ann. sec. 1455.1c(b)(1) (1989 Cum. Supp.)). This approach differs somewhat from that in the ADA, in that the latter compares the proportionality of the accessibility costs to the overall planned alteration rather than to the underlying value of the building. The Committee believes, however, that it would be consistent with the ADA approach for the minimum guidelines or regulations to establish a specific standard, such as 30% of the alteration costs, for determining the disproportionality of the accessible path of travel and related accessibility features required under Sec. 302(b)(2)(A)(vi).

The "path of travel" to an altered area means a continuous, unobstructed way of pedestrian passage by means of which that area may be approached, entered, used, and exited; and which connects that area with an exterior approach (including sidewalks, streets, and parking areas), an entrance to the facility, and other parts of the facility. An accessible path of travel may consist of walks and sidewalks; curb ramps and other interior or exterior pedestrian ramps; clear floor paths through lobbies, corridors, rooms, and

other improved areas; parking access aisles; elevators and lifts; or a combination of such elements. An accessible path of travel is analogous to the "accessible route" and "circulation path" concepts in the existing Uniform Federal Accessibility Standards (UFAS sec. 3.5).

The legislation includes an exception regarding the installation of elevators, which specifies that the obligation to make a facility readily accessible to and usable by individuals with disabilities shall not be construed to require the installation of an elevator for facilities that are less than three stories or that have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

The Committee wishes to make it clear that the exception regarding elevators does not obviate or limit in any way the obligation to comply with the other accessibility requirements established by this legislation, including requirements applicable to floors which, pursuant to the exception, are not served by an elevator. And, in the event a facility which meets the criteria for the exception nonetheless has an elevator installed, then such elevator shall be required to meet accessibility standards.

The Committee intends that the term "facility" means all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property or interest in such property, including the site where the building, property, structure or equipment is located. This definition is consistent with the definitions used under current Federal regulations and standards and thus includes both indoor areas and outdoor areas where human-constructed improvements, structures, equipment, or property have been added to the natural environment. For example, curb cuts are required to provide access to the facility from the street or parking lot.

The phrase "readily accessible to and usable by individuals with disabilities" is a term of art which is explained in the section of the report concerning new construction.

The phrase "to the maximum extent feasible" has been included to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being entirely accessible to and usable by individuals with disabilities. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

As noted above, a public accommodation violates this title by discriminating against an individual on the basis of disability regarding "goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation." Where a place of public accommodation is operated in premises that are rented or leased, either the landlord or the tenant may have legal control over the making of alterations, depending upon the terms of the lease or rental agreement they have entered into and state and local legal requirements regarding such contracts. Under some rental agreements, the tenant may be permitted to make certain

alterations upon the premises, which may or may not be subject to a requirement of prior approval from the landlord. In other circumstances, the contractual agreement between the parties may prohibit the tenant from making any alterations. In most cases, the landlord will have full control over public and common areas a facilities.

Legal responsiblity for making alterations under this title will depend upon who has the legal authority to make such alterations, generally determined by the contractual agreement between the landlord and tenant. The obligation to remove architectural and communication barriers in existing buildings where such barrier removal is readily achievable (sec. 302(b)(2)(A)(iv)) and to include accessibility when making alterations (sec. 302(b)(2)(A)(vi)) are both stated in terms that make a "failure" to take such actions unlawful discrimination. The responsibility under this title for such a "failure" rests with the party—either the landlord or the tenant, depending upon their arrangement—who had the legal authority to make the changes required under the Act.

For example, if readily achievable modifications are needed on the premises of a place of public accommodation, and the lease gives the tenant the right to make such changes, then the tenant is responsible under this title to make such modifications. On the other hand, if a lease reserves all authority for making alterations to a landlord of premises in which a public accommodation is located, then the landlord is responsible for making the accessibility modifications called for in the Act.

In regard to the obligation in the cases of alterations that trigger the requirements that the altered area be accessible and, in some cases, that a path of travel and facilities be made accessible as well, this obligations stated in terms requiring an entity to "make the alterations in such a manner that" accessibility requirements are met (sec. 302(b)(2)(A)(vi)). Obviously, this langauge applies only to the entity that is making the alterations—the entity that has responsibility for otherwise undertaking the renovations or alteration.

Consequently, if a tenant is making alterations upon its premises pursuant to terms of a lease that grant it the authority to do so (even if they constitute alterations that trigger the path of travel requirement), and the landlord is not doing alterations to other parts of the facility then the alterations by the tenant on its own premises does not trigger a pathway of travel or bathrooms, etc. obligation upon the landlord in areas of the facility under its authority and not otherwise being altered.

Section 302(b)(2)(B) of the legislation includes policies applicable to fixed route vehicles used by entities that are not in the principal business of transporting people. First, it is considered discrimination for an entity to purchase or lease a bus or a vehicle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act that are not readily accessible to and usable by individuals with disabilities except that over-the-road buses shall be subject to section 304(b)(4) (which delays the effective date for 6 years for small operators and 5 years for other operates) and section 305

(which provides for a study of how to make the impact of making such buses accessible).

If an entity not in the principal business of transporting people purchases or leases a vehicle carrying 16 or fewer passengers after the effective date of title III that is not readily accessible to or usable by indviduals with disabilities, it is discriminatory for such an entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

Section 302(b)(2)(C) includes provisions applicable to vehicles used in demand responsive systems by entities that are not in the principal business of transporting people. The provisions applicable to such vehicles are the same as those applicable to fixed route vehicles except that the entity need not ensure that all new vehicles carryng more than 16 passengers are accessible if it can demonstrate that the system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public.

For example, where a hotel at an airport provides free shuttle service, the hotel need not purchase new vehicles that are accessible so long as it makes alternative equivalent arangements for transporting people with disabilities who cannot ride the inaccessible vehicles. This might be accomplished through the use of a portable lift or by making arrangements with another entity that has an accessible vehicle that can be made available to provide equivalent shuttle service.

New construction

Section 303 of the legislation sets forth obligations with respect to the construction of new facilities. This section is applicable to public accommodations and commercial facilities.

Recipients of federal financial assistance currently must ensure that all newly constructed facilities are readily accessible to and usable by people with disabilities. The Section 504 regulations, which govern these recipients, use the Uniform Federal Accessibility Standards (UFAS) and the American National Standard for Building and Facilities (ANSI), which are based on model guidelines developed by the Architectural and Transportation Barriers Compliance Board.

Under UFAS, the areas of a new building which must be accessible are those "for which the intended use will require public access or which may result in the employment of physically handicapped persons." Thus, both areas that will be used by patrons and areas that will be used by employees, are covered under these standards.

The intent of this title is to extend this obligation to all ewly constructed commercial establishments. In many situations, the new construction will be covered as a "public accommodation," because in many situations it will already be known for what business the facility will be used. The Act also includes, however, the phrase "commercial facilities," to ensure that *all* newly constructed commercial facilities will be constructed in an accessible manner. That is, the use of the term "commercial facilities" is designed to cover those structures that are not included within the specific definition of "public accommodation." In either case, however, the standard

governing the construction is that the facility must be "readily accessible to and usable by" people with disabilities.

The phrase "commercial facilities" has been substituted for the phrase "potential places of employment" of H.R. 2273 in order to eliminate any possible confusion between coverage of title III, concerning new construction, and coverage of title I, concerning employmnent practices. Obviously, there is an intended conceptual connection between the two titles. To the extent that new facilities are built in a manner that make them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees. The legal requirements of the two titles, however, are separate and independent.

The term "commercial facilities," retains the same definition as that given to "potential places of employment" in the Senate bill (S. 933). The new term therefore, is designed solely to eliminate any unnecessary confusion regarding coverage of employers; it is not intended to reduce the scope of the definition (i.e., any facility intended for non-residential use). Further, the term is not intended to be defined by dictionary or common industry definitions. Rather, "commercial facility", which is to be interpreted consistently with "potential places of employment", is defined as in S. 933, broadly to include any facility that is intended for nondresidential use and whose operations will affect commerce. Thus, for example, office buildings, factories, and other places in which employment will occur, come within this definition. The phrase, "whose operations affect commerce," is intended to include the full scope of coverage under federal constitutional commerce clause doctrine.

Section 303(a) of the legislation specifies that it is unlawful discrimination for a public accommodation or commercial facility to fail to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to do so, in accordance with standards set forth or incorporated by reference in regulations issued under title III.

Section 303(b) of the legislation exempts entities from installing elevators under the same circumstances applicable to alternations (see section 302(b)(2)(A)(vi) and the accompanying clarifications in the report).

The phrase "readily accessible to or usable by" is a term of art which, in slightly varied formulations, has been applied in the Architectural Barriers Act of 1968 ("ready access to, and use of"), the Fair Housing Act of 1968, as amended ("readily accessible to and usable by"), and the regulations implementing section 504 of the Rehabilitation Act of 1973 ("readily accessible to and usable by") and is included in standards used by Federal agencies and private industry, e.g., the Uniform Federal Accessibility Standards (UFAS) ("ready access to and use of") and the American National Standard for Buildings and Facilities—Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1) (readily accessible to, and usable by).

The term is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and

use a facility. While the term does not necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility, entailing accessibility of parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services, programs, facilities, accommodations and work areas available at the facility.

The term is not intended to require that all parking spaces, bathrooms, stalls within bathrooms, etc. are accessible; only a reasonable number must be accessible, depending on such factors as their use, location and number. However, when the facilities involved do not serve identical functions, each facility must be accessible. For example, to provide equal service, all check-out lanes in a supermarket should be built sufficiently wide to allow passage by individuals who use wheelchairs. Likewise, meeting rooms at a conference center may be used for different purposes at any given time and therefore all must be accessible. Accessibility elements for each particular type of facility should assure both ready access to the facility and usability of its features and equipment and of the goods, services, and programs available therein.

For a hotel, "readily accessible to and usable by" includes, but is not limited to, providing full access to the public use and common use portions of the hotel; requiring all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs; making a percentage of each class of hotel rooms fully accessible (e.g., including grab bars in bath and at the toilet, accessible counters in bathrooms); audio loops in meeting areas; signage, emergency flashing lights or alarms; braille or raised letter words and numbers on elevators; and handrails on stairs and ramps.

Of course, if a person with a disability needing a fully accessible room makes an advance registration without informing the hotel of the need for such a room and the person arrives on the date of the reservation and no fully accessible room is available, the hotel has not violated the Act. Moreover, a hotel is not required to forego renting fully accessible rooms to nondisabled persons if to do so would cause the hotel to lose a rental. However, the hotel must make efforts to afford the person who uses a wheelchair the accessible room, short of losing the rental.

In a physician's office, "readily accessible to and usable by" would include ready access to the waiting areas, a bathroom, and a percentage of the examining rooms.

Historically, particularized guidance and specifications regarding the meaning of the phrase "readily accessible to and usable by" for various types of facilities have been provided by MGRAD, UFAS, and the ANSI standards. Under this legislation, such specificity will be provided by the expanded Minimum Guidelines and Requirements for Accessible Design (MGRAD) standards to be issued by the Architectural and Transportation Barriers Compliance Board and by the regulations issued by the Attorney General, both of which are discussed subsequently in this report.

It is the expectation of the Committee that the regulations issued by the executive branch could utilize appropriate portions of MGRAD.

It is also the Committee's intent that the regulations will include language providing that departures from particular technical and scoping requirements, as revised, will be permitted so long as the alternative methods used will provide substantially equivalent or greater access to and utilization of the facility. Allowing these departures will provide public accommodations and commercial facilities with necessary flexibility to design for special circumstances and will facilitate the application of new technologies.

As noted above, the standard of "readily accessible to and usable by" applies not only to areas that will be used by patrons, but also to areas that may be used by disabled employees. The parameters of the standard as it applies to patrons has been set forth above. The same basic approach applies in employment areas for both public accommodations and commercial facilities. Thus, access into and out of the rooms is required. In addition, there must be an accessible path of travel in and around the employment area. The basic objective is that a person with a disability must be able to get to the employment area. These design standards do not cover unusual spaces such as catwalks and fan rooms.

The standard does not require, however, that individual workstations be constructed accessible or be outfitted with fixtures that make it accessible to a person with a disability. Such modifications will come into play in the form of reasonable accommodations when a person with a disability applies for a specific job and is governed by the undue hardship standard. If the builder builds fixtures and equipment to service a worksite (e.g., racks, shelves), the fixtures and shelves do not have to be made accessible. If a qualified person with a disability applies, whether such fixtures and equipment can be modified to allow the person to do the job would be an issue of reasonable accommodation.

Two items regarding the placement of fixtures and equipment should be noted. As have often been pointed out, it is always less expensive to build something new in an accessible manner than it is to retrofit an existing facility to make it accessible. That concept applies as well in the building and placement of fixtures and equipment. Thus, if it would not affect usability or enjoyment by members of the general public, consideration should be given in new construction to placing fixtures and equipment at a convenient height for accessibility. In addition, if they are commercially available, and it would not affect usability or enjoyment by the general public, an effort should be made to purchase new fixtures and equipment that are adjustable so that reasonable accommodations in the future may not pose undue hardships.

The Committee decided not to limit this provision to commercial facilities of 15 or more employees because of the desire to establish a uniform requirement of accessibility in new construction, because of the ease with which such a requirement can be accomplished in the design and construction stages, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is open to the public is always a possibility.

The phrase "commercial facilities" is not intended to make an establishment that is not a public accommodation subject to the other provisions of this title, e.g., the obligation to provide auxiliary aids or services.

The phrase "structurally impracticable" is a narrow exception that will apply only in rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. Such limitations for topographical problems are analogous to an acknowledged limitation in the application of the accessibility requirements of the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying the Act, the House Committee on the Judiciary noted:

> Certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing traditionally may be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites. (Cite.)

By incorporating the phrase "structurally impracticable," this title explicitly recognizes an exception analogous to the "physical integrity" exception for peculiarities of terrain recognized implicitly in statutory language and expressly in the House Committee Report accompanying the Fair Housing Amendments Act. As under the Fair Housing Amendments Act, this is intended to be a narrow exception to the requirement of accessibility. It means that only where unique characteristics of terrain prevent the incorporation of accessibility features and would destroy the physical integrity of a facility is it acceptable to deviate from accessibility requirements. Buildings that must be built on stilts because of their location in marshlands or over water are one of the few situations in which the structurally impracticable exception would apply.

Neither under this title nor under the Fair Housing Amendments Act should an exception to accessibility requirements be applied to situations in which a facility is located in "hilly" terrain or on a plot of land upon which there are steep grades; in such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and ought to be required in the construction of new facilities.

In those circumstances in which it is structurally impracticable to achieve full compliance with accessibility requirements under the ADA, public accommodations and commercial facilities should still be designed and constructed to incorporate accessibility features to the extent that they are structurally practicable. The accessibility requirements should not be viewed as an all-or-nothing proposition in such circumstances.

If it is structurally practicable for a facility in its entirety to be readily accessible to and usable by people with disabilities, then those portions which can be made accessible should be. If a building cannot comply with the full range of accessibility requirements because of structural impracticability, then it should still be required to incorporate those features which are structurally practicable. And if it is structurally impracticable to make a particular

facility accessible to persons who have particular types of disabilities, it is still appropriate to require it to be made accessible to persons with other types of disabilities.

If, for example, a facility which is of necessity built on stilts cannot be made accessible to persons who use wheelchairs because itis structurally impracticable to do so, this is no reason for the facility not to be accessible for individuals with vision or hearing impairments or other kinds of disabilities.

Prohibition of discrimination in public transportation services provided by private entities

Section 304(a) of the legislation specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primary engaged in the business of transporting people, but is not in the principal business of providing air transporation, and whose operations affect commerce.

The term "public transportation" is defined in section 301(4) of the legislatiion to mean transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

The Committee wishes to make it clear that the provisions of title III do not apply to public entities such as public transit authorities and school districts. Public entities providing transportation services are generally subject to the provisions of title II of this legislation and school bus operations are generally covered by regulations implementing section 504 of the Rehabilitation Act of 1973 issued by agencies providing Federal financial assistance to school districts.

The Committee also wishes to make it clear that title III does not apply to volunteer-driven commuter ridership arrangements.

The Committee excluded transportation by air because the Congress recently passed the Air Carriers Access Act, which was designed to address the problem of discrimination by air carriers and it is the Committee's expectation that regulations will be issued that reflect congressional intent.

Section 304(b) of the legislation includes specific applications of the general prohibition set out in section 303(a). As used in subsection (a), the term "discrimination against" includes:

(1) The imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;

(2) The failure of an entity to:

(A) Make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);

(B) Provide auxiliary aids and services consistent with the requirements of section 302(b)(2)(A)(iii); and

(C) Remove barriers consistent with the requirements of section 302(b)(2)(A)(iv), (v), and (vi); and

(3) The purchase or lease of a new vehicle (other than an automobile or over-the-road bus) that is to be used to provide

public transportation services, and for which a solicitation is made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The bill includes a special exception for vehicles used in a demand responsive system. In the case of a vehicle used in a demand-response system, the new vehicle need not be readily accessible to and usable by individuals with disabilities if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

With respect to the purchase of new over-the-road buses, it is considered discrimination to purchase or lease a new over-the-road bus that is used to provide public transportation services and for which a solicitation is made later than 7 years after the date of enactment of this Act for small providers (as defined by the Secretary of Transportation) and 6 years for other providers, that is not readily accessible to and usable by individuals with disabilities.

The term "readily accessible to and usable by" means, with respect to vehicles used for public transportation, able to be entered into and exited from and safely and effectively used by individuals with disabilities, including individuals who use wheelchairs.

Currently, technology may not exist that will enable an individual who uses a wheelchair to access restrooms in over-the-road buses without resulting in the significant loss of current seating capacity. Since this legislation is future driven, the Committee intends that the Department of Transportation develop regulations which require that accessible restrooms be installed on intercity coaches when technologically feasible.

Lifts or ramps, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the current features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals who use wheelchairs or three-wheeled mobility aids; how many spaces per vehicle are to be made available for wheelchairs is, however, a determination that depends on various factors, including the number of vehicles in the fleet, seat vacancy rates, and usage by people with disabilities.

The Committee intends that, consistent with these general factors, the determination of how many spaces must be available should be flexible and generally left up to the provider; provided that at least some spaces on each vehicle are accessible. Technical specifications and guidance regarding lifts and ramps, wheelchair spaces, and securement devices are to be provided in the minimum guidelines and regulations to be issued under this legislation.

The Committee intends that during the interim period prior to the date when over-the-road buses must be readily accessible to and usable by individuals with disabilities that regulations specify that providers modify their policies so that individuals who use wheelchairs may get on and off such buses without having to bring their own attendant to help them get on and off the bus. Further, policies should be modified to require the on-board storage of batteries for battery operated wheelchairs.

Section 305 of the legislation directs the Office of Technology Assessment to undertake a study to determine the access needs of individuals with disabilities to over-the-road buses and the most cost effective methods for making over-the-road buses readily accessible to and usable by individuals with disabilities.

In determining the most cost-effective methods for making over-the-road buses readily accessible to and usable by persons with disabilities, particularly individuals who use wheelchairs, the legislation specifies that the study should analyze the cost of providing accessibility, recent technological and cost saving developments in equipment and devices, and possible design changes.

Thus, the Committee is interested in having this study include a review of current technology such as lifts that enable persons with mobility impairments, particularly those individuals who use wheelchairs, to get on an off buses without being carried; alternative designs to the current lifts; as well as alternative technologies and modifications to the design of buses that may be developed that will also enable such individuals to get on and off over-the-road buses without being carried.

It is also expected that the study will review alternative design modifications that will enable an individual using the over-the-road bus to have access to the restroom and at the same time permitting the provider to retain approximately the same seating capacity.

The study must also assess the impact of accessibility requirements on the continuation of inter-city bus service by over-the-road buses, with particular consideration of impact on rural service in light of the economic pressures on the bus industry that have lead to a reduction of service, particularly in rural America. According to an analysis by the Interstate Commerce Commission staff, 3,400 communities lost all intercity bus service between 1982 and 1986. Of these nine-tenths were areas with populations of under 10,000.

Thus, this study should analyze how the private bus operators can comply with the requirement in section 304 of the legislation that over-the-road buses be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, without contributing to the deterioration of rural bus service.

It is the Committee's expectation that the study will also review current policies that impede the shared use by private companies providing tours and charter services of public buses that are currently accessible. Another component of the study may be to seek ways to link local providers of accessible transportation services with intercity bus service in hub areas. This may necessitate expansion of service by local providers to match intercity and intermodal schedules in order to help ensure effective development of such a feeder service relationship.

The Committee recognizes that after deregulations of the airline and rail industries, safety net programs were implemented to assist States in preserving efficient air and rail transportation, primarily between smaller cities and communities threatened by the loss of service. No similar Federal program was established to assist the private bus industry. The Committee expects that the study will consider whether and, if deemed appropriate, identify policy alter-

natives that might assist private bus companies meet the mandates in this legislation.

The legislation calls for the establishment of an Advisory Committee to advise the O.T.A. in the conduct of the study. The Committee shall be composed of: private operators using over-the-road buses, bus manufacturers, and lift manufacturers; individuals with disabilities, including potential users of such buses; and individuals with expertise. The Committee shall have equal numbers of members from the first two groups designated above, with more than 50% of the total membership being from those groups. Additionally, the section sets out a process for review of the draft report on the study by the Architectural and Transportation Barriers Compliance Board, with written comments received from the ATBCB incorporated in the final report. Finally, the section states that if the President, after reviewing the report, determines that application of the timelines in section 304(b)(4) will result in significant reduction in intercity bus service, such deadline shall be extended by one additional year.

Anyone in the business of providing taxi service shall not discriminate on the basis of disability in the delivery of that service. For example, it would be illegal under the Act to refuse to pick up a person on the basis of that person's disability. A taxi cab driver could not refuse to pick up someone in a wheelchair because he or she believes that the person could not get out of their chair or because he or she did not want to lift the wheelchair into the trunk of the taxi or put it in the back seat. Likewise a taxi driver cannot refuse to serve a person with a disability who uses an assistive dog.

Regulations

Section 306(a) of the legislation specifies that not later than one year after the date of enactment of this Act, the Secretary of Transportation shall issue regulations in an accessible format that shall include standards applicable to facilities and vehicles covered under section 302(b)(2)(B) and (C) and section 304.

With respect to section 304(b)(4) of the legislation, the Committee recognizes the apparent anomaly in requiring the promulgation of regulations while a needs and impact assessment is in progress and two years prior to the submission of the study and its recommendations to the President and the Congress. This timing, however, should not be construed as calling into question the importance or necessity of empirical data and technological information to this rulemaking process. Rather, the Committee believed it wise that, with respect to over-the-road buses, regulations be in place well in advance of the compliance dates of the Act.

The Committee fully expects that, following submission of the needs and impact assessment, the study and its recommendations will be expeditiously and carefully reviewed to determine if, or to what extent, the regulations promulgated pursuant to this section of the legislation need to be revised or amended.

Section 306(b) of the legislation specifies that not later than one year after the date of enactment of this Act, the Attorney General shall issue regulations in an accessible format to carry out the remaining provisions of this title not referred to in subsection (a) that

include standards applicable to facilities and vehicles covered under section 302.

Standards included in regulations issued under subsections (a) and (b) shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504.

The Committee also included a new provision of interim accessibility standards. The Committee fully expects that the final regulations implementing this section will be issued within one year, as mandated by the Act. However, in the unlikely event that the regulations have not been issued, this provision sets forth the approach that entities covered under the Act can use so as to ensure that they are in compliance with the Act. Under this provision, if final regulations have not been issued, compliance with the current Uniform Federal Accessibility Standards will suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities. In addition, this approach provides that if the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines it is required to issue under this Act, and those guidelines have been available for one year, a compliance with those guidelines will then be necessary to satisfy the Act's requirement that facilities be built in an accessible manner.

Exemptions for private clubs and religious organizations

Section 307 of the legislation specifies that the provisions of title III do not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 or to religious organizations or to entities controlled by religious organizations. Places of worship and schools controlled by religious organizations are among those organizations and entities which fall within this exemption.

The reference to "entities controlled by a religious organization" is modeled after the provisions in title IX of the Education Amendments of 1972. Thus, it is the Committee's intent that the term "controlled by a religious organization" be interpreted consistently with the Attachment which accompanied the Assurance of Compliance with title IX required by the U.S. Department of Education. Of course, the Committee recognizes that unlike the title IX exemption, this provision applies to entities that are not educational institutions. The term "religious organization" has the same meaning as the term "religious organization" in the phrase "entities controlled by a religious organization."

Activities conducted by a religious organization or an entity controlled by a religious organization on its own property which are open to nonmembers of that organization or entity are included in this exemption.

Enforcement

Section 308 of the legislation sets forth the scheme for enforcing the rights provided for in title III. Section 308(a)(1) provides a private right of section for any individual who is being or has reasonable grounds for believing that he or she is about to be subjected to discrimination on the basis of disability in violation of title III. The

Committee added the term "has reasonable grounds" to make the provision consistent with title II of the Civil Rights Act of 1964. This subsection makes available to an individual aggrieved under this title the remedies and procedures set forth in section 204a-3(a) of the Civil Rights Act of 1964 (preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order).

Section 308(a)(2) of the legislation makes it clear that in the case of violations of section 302(b)(2)(A)(iv) pertaining to removal of barriers in existing facilities, section 302(b)(2)(A)(iv) pertaining to alternations of existing facilities, and section 303(a) pertaining to new construction, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities as required by title III.

Where appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by this title.

Section 308(b) of the legislation specifies the enforcement scheme for the Attorney General. First, the Attorney General shall investigate alleged violations of title III, which shall include undertaking periodic reviews of compliance of public accommodations and commercial facilities.

The Committee added a new provision, section 308(b)(1)(A)(ii), regarding certification by the Attorney General. Upon the application of a state or local government, the Attorney General, in consultation with the Architectural and Transportation Barriers Compliance Board, may certify that a state law or building code, or similar ordinance which establishes accessibility requirements, meets or exceeds the minimum requirements of this Act for the accessibility and usability of covered facilities under this title. Such certification can occur only after public notice of such a request has been given and after a public hearing has been held in which individual with disabilities, and organizations representing such individuals, have been provided an opportunity to testify against such certification if they so wish.

This provision is intended simply to allow builders and architects to use codes and laws with which they are familiar, if those laws, *in fact,* meet or exceed the requirements of this Act. This provision is not intended in any way to allow entities to avoid the purposes and goals of this Act. Thus, the Committee expects that the Attorney General will carefully scrutinize any such requests for certification and seriously consider any objections raised by individuals with disabilities to such certification, if such objections are made.

At any enforcement proceeding under this section, any certification granted by the Attorney General shall be rebuttable evidence that such state law or ordinance does meet or exceed the minimum requirements of this Act. That is, the certification may be presented as evidence, but it can then be rebutted by the plaintiff.

It is expected that, if the Attorney General proposes to grant certification for a particular law, code, or ordinance, a notice shall be issued in the Federal Register and an informal hearing shall be held before a Department of Justice official (not an Administrative Law Judge), at which interested prsons would have an opprtunity

to express their comments. Certification is not to be considered rulemaking for purposes of the Administrative Procedure Act, 5 U.S.C. 551 et seq. The Attorney General may establish priorities for considering certifications (e.g., priority could be given to State documents before local documents, or to those that incorporated acceptable model building codes). The Attorney General may also establish procedures for revoking certification and establish the circumstances in which such action would be appropriate.

If the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by title III or that any person or group of persons has been denied any of the rights granted by title III and such denial raises an issue of general public importance, the Attorney General may commence a civil action in any appropriate United States district court.

In a civil action brought by the Attorney General, the court may grant any equitable relief it considers to be appropriate, including granting temporary, preliminary, or permanent relief, providing an auxiliary aid or service, modification of policy or alternative method, or making facilities readily accessible to and usable by individuals with disabilities, to the extent required by title III. In addition, a court may award such other relief as the court considers to be appropriate, including monetary damages to persons aggrieved, when requested by the Attorney General.

Furthermore, the court may vindicate the public interest by assessing a civil penalty against the covered entity in an amount not exceeding $50,000 for a first violation and not exceeding $100,000 for any subsequent violation. Section 308(b)(3) makes it clear that, in counting the number of previous determinations of violations for determining whether a "first" or "subsequent" violation has occurred, determinations in the same trial on liability that the covered entity has engaged in more than one discriminatory act are to be counted as a single violation. In other words, assume that the Attorney General brings a pattern or practice case against a public accommodation, and the court determines that the accommodation has engaged in a series of violations of the Act. All of these violations together would count as the "first violation" for purposes of assessing a civil penalty. This would be the case regardless of how the case was dealt with—for example, by trial, settlement, or consent decree. A "second violation" would not accrue to that public accommodation until the Attorney General brought another suit against the accommodation and the accommodation was again held in violation. Again, all of the violations on the second suit would be cumulatively considered as a "subsequent violation."

Section 308(b)(4) clarifies that the term "monetary damages" and "other relief" in section 308(b)(2) does not include punitive damages. It does include, however, all forms of compensatory damages, including out-of-pocket expenses and damages for pain and suffering. The Attorney General has discretion regarding the type of damages he or she seeks on behalf of aggrieved persons, if he or she chooses to seek such monetary damages.

Section 308(b)(2)(C) provides that, "to vindicate the public interest," a court may assess a civil penalty against the entity that has been found to be in violation of the Act in suits brought by the At-

torney General. In addition, the Act further provides that, in considering what amount of civil penalty, if any, is appropriate, the court should give consideration to "any good faith effort or attempt to comply with this Act." In evaluating such good faith, the court should consider "among other factors it deems relevant, whether the entity could have reasonably anticipated the need for an appropriate type of auxiliary aid needed to accommodate the unique needs of a particular individual with a disability."

The "good faith" standard referred to in this section is not intended to imply a willful or intentional standard—that is, an entity cannot demonstrate good faith simply by showing that it did not willfully, intentionally, or recklessly disregard the law. At the same time, the absence of such a course of conduct would be a factor a court should weigh in determining the existence of good faith.

The "good faith" standard is a standard that should be seriously applied to protect from the assessment of civil penalties, as well as from the assessment of maximum civil penalties, those entities that have honestly and reasonably attempted to comply with the law. For example, a public accommodation is not required to anticipate all of the auxiliary aids that might be necessary to accommodate an individual with a unique disability. While, of course, a public accommodation is expected to anticipate such disabilities as visual, speech, hearing and mobility impairments, the Committee does not, as reflected in the statutory language, expect that civil penalties will be assessed against entities that reasonably and honestly could not have anticipated the unique needs of individuals with certain types of unusual disabilities and therefore may not have had some appropriate auxiliary aid at hand. Of course, once an individual has identified and requested a specific auxiliary aid, the public accommodation cannot subsequently claim that the aid could not have been reasonably anticipated. The public accommodation, of course, would still not have to provide the aid if it would impose an undue burden.

In sum, an honest effort to comply with the law should be a basic factor taken into account by the court in assessing whether any civil penalties, or the highest levels of those penalties, should apply against a public accommodation. As an additional example, assume that a public accommodation provided an auxiliary aid to a person with a disability, which the public accommodation reasonably believed would enable the person to effectively enjoy the goods and services provided by the accommodation. Assume further that a court ultimately determined that the auxiliary aid was not adequate for the person with a disability and therefore that the accommodation was in violation of the requirements of the Act. Assuming further that this action (or actions) somehow rose to the level of a case brought by the Attorney General, a court's assessment that the public accommodation had made a reasonable and honest effort to provide the auxiliary aid should obviously be taken into account by the court in determining good faith for the purposes of assessing any civil penalty.

Effective date

In accordance with section 309 of the legislation, title III of the legislation shall become effective 18 months after the date of enactment of this legislation.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

Title IV of the legislation, as reported, will help to further the statutory goals of universal service as mandated in the Communications Act of 1934. It will provide to hearing- and speech-impaired individuals telephone services that are functionally equivalent to those provided to hearing individuals.

Background

There are over 24 million hearing-impaired and 2.8 million speech-impaired individuals in the United States, yet inadequate attention has been paid to their special needs with respect to accessing the Nation's telephone system. Given the pervasiveness of the telephone for both commercial and personal matters, the inability to utilize the telephone system fully has enormous impact on an individual's ability to integrate effectively in today's society.

The Communications Act of 1934 mandates that communications services be "[made] available, so far as possible, to all the people of the United States. * * * ". (Section 1, emphasis added). This goal of universal service has governed the development of the nation's telephone system for over fifty years. The inability of over 26 million Americans to access fully the Nation's telephone system poses a serious threat to the full attainment of the goal of universal service.

In order to realize this goal more fully, Title IV of this legislation amends Title II of the Communications Act of 1934, as amended, by adding a new section 225. This new section imposes on all common carriers providing interstate or intrastate telephone service, an obligation to provide to hearing and speech-impaired individuals telecommunications services that enable them to communicate with hearing individuals. These services must be functionally equivalent to telephone service provided to hearing individuals. Carriers are granted the flexibility to determine whether such services are provided by the carrier alone, in concert with other carriers, or through a designee. Hereinafter, this part of the Report will be referring to this new section 225 and not to sections in S. 933, The Americans with Disabilities Act of 1989.

Currently, individuals with hearing and speech impairments can communicate with each other over the telephone network with the aid of Telecommunications Devices for the Deaf (TDDs). TDDs use a typewriter-style device equipped with a message display (screen and/or printer) to send a coded signal through the telephone network. However, users of TDDs can communicate only with other users of TDDs. This creates serious hardships for Americans with hearing and/or speech impairments, since access to the community at large is significantly limited.

The Commitee intends that section 225 better serve to incorporate the hearing- and speech-impaired communities into the telecommunications mainstream by requiring that telephone services

be provided to hearing and/or speech impaired individuals in a manner that is functionally equivalent to telephone services offered to those who do not have these impairments. This requirement will serve to bridge the gap between the communications-impaired telephone user and the community at large. To participate actively in society, one must have the ability to call friends, family, businesses and employers.

Current technology allows for communications between a TDD user and a voice telephone user by employing a type of relay system. Such systems include a third party operator who completes the connection between the two parties and who transmits messages back and forth between the TDD user and the hearing individual. The originator of the call communicates to the operator either by voice or TDD. The operator then uses a video display system to translate the typed or voice message simultaneously from one medium to the other.

Although the Committee notes that relay systems represent the current state-of-the-art, this legislation is not intended to discourage innovation regarding telecommunications services to individuals with hearing and speech impairments. The hearing- and speech-impaired communities should be allowed to benefit from advancing technology. As such, the provisions of this section do not seek to entrench current technology but rather to allow for new, more advanced, and more efficient technology.

The Committee intends that the FCC have sufficient enforcement authority to ensure that telecommunications relay services are provided nationwide and that certain minimum federal standards are met by all providers of such services. The FCC's authority over the provision of intrastate telecommunications relay services, however, is expressly limited by certification procedures required to be established under this section whereby a state retains jurisdiction over the intrastate provision of telecommunication relay services.

The Committee finds it necessary to grant the FCC such residual authority in this instance to ensure universal service to the hearing- and speech-impaired community. Although a number of states have mandated statewide relay systems, the majority of states have not done so. Moreover, the systems that do exist vary greatly in quality and accessibility. The Committee finds that to ensure universal service to the population of users, service must be made uniformly available on a local, intrastate, and interstate basis. It is the Committee's hope and expectation, however, that all states will seek certification in a timely manner and that the FCC will not find it necessary to exercise its enforcement authority. It is essential to this population's well-being, self-sufficiency and full integration into society to be able to access the telecommunications network and place calls nationwide without regard to geographic location.

Attaining meaningful universal service for this population also requires that some level of minimum federal standards for service, service quality, and functional equivalency to voice telephone services be established and maintained. The FCC is therefore required to establish certain minimum federal standards that all telecommunications relay service providers must meet.

By requiring telecommunications relay services to be provided throughout the United States, this section takes a major step towards enabling individuals with hearing and speech impairments to achieve the level of independence in employment, public accommodations and public services sought by other sections of the Americans with Disabilities Act. The Committee concludes that expanding the FCC's authority in this instance will both promote interstate commerce and be of benefit to all Americans.

The grant of jurisdiction to the FCC is limited, however, by the state certification procedures required to be established under this section. It is the Committee's intention that these procedures operate to preserve initiatives by a state or group of states to implement a telecommunications relay services program within that state or within a region either through the state itself, through designees, or through regulation of intrastate common carriers. As such, the section provides that any state may regulate intrastate telecommunications relay services provided by intrastate carriers once the state is granted certification by the FCC. The FCC is to establish clearly defined procedures for requesting certification and a review process to ensure that a state program, however it is provided, satisfies the minimum standards promulgated under this section. The certification procedures and review process should afford the least possible intrusion into state jurisdiction consistent with the goals of this section to have nationwide universal service for hearing- and speech-impaired individuals.

The Committee intends that telecommunications relay services be governed by minimum federal standards that will ensure that telephone service for hearing and speech impaired individuals is functionally equivalent to telephone services offered to hearing individuals. Such standards, however, should not have the effect of freezing technology or thwarting the introduction of a superior or more efficient technology.

Cost recovery for telecommunications relay services will be determined by the FCC in the case of interstate telecommunications relay services and by certified states in the case of intrastate telecommunications relay services. While states are granted the maximum latitude to determine the methods of cost recovery for intrastate relay services provided under their jurisdiction, the FCC is specifically prohibited from allowing the imposition of a flat monthly charge on residential end users to recover the costs of providing interstate telecommunications relay services. It is the Committee's expectation that the costs of providing telecommunications relay services will be considered a legitimate cost of doing business and therefore a recoverable expense through the regulatory ratemaking process.

Definitions

Section 225(a) defines: (1) "Common Carrier or Carrier" to include interstate carriers and intrastate carriers for purposes of this section only; (2) "TDD" to mean a machine that may be used by a variety of disabled individuals such as deaf, hard of hearing, deafblind, or speech impaired individuals and that employs graphic communications through the transmission of coded signals over telephone wires; and (3) "Telecommunications relay services" to

mean telephone transmission services that allow a hearing- and/or speech-impaired individual to communicate in a manner that is functionally equivalent to voice communications services offered to hearing individuals. The term includes, but is not limited to, TDD relay services.

Availability of telecommunication relay services

Section 225(b) states that in furtherance of the goals of universal service, the FCC must ensure that interstate and intrastate telecommunications relay services are provided to the greatest extent possible and in the most efficient manner.

Section 225(b)(2) extends the remedies, procedures, rights and obligations applicable to interstate carriers under the Communications Act of 1934, as amended, to intrastate carriers for the limited purpose of implementing and enforcing the requirements of this section.

Provision of services

Section (c) requires that carriers providing telephone voice transmission services provide telecommunications relay services within two years after the date of enactment of this section. Carriers are to offer to hearing- and speech-impaired individuals services which are functionally equivalent to telephone services provided to hearing individuals including providing services with the same geographic radius that they offer to hearing individuals. Carriers are granted the flexibility to provide such services either individually, in concert with other carriers, or through designees. In exercising this flexibility to appoint designees, however, carriers must ensure that all requirements of this section are complied with.

Regulations

Section (d) requires the FCC to prescribe the necessary rules and regulations to carry out the requirements of this section with one year of its enactment.

Also, given the unique and specialized needs of the population that will be utilizing telecommunications relay services, the FCC should pay particular attention to input from representatives of the hearing and speech-impaired community. It is recommended that this input be obtained in a formal manner such as through an advisory committee that would represent not only telecommunications relay service consumers but also carriers and other interested parties. The Committee notes that the FCC has already issued several notices on the creation of an interstate relay system and the most efficient way such a system could be provided. While the FCC is afforded a significant amount of flexibility in implementing the goals of this section, subsection (d) requires that the FCC establish certain minimum standards, practices and criteria applicable to all telecommunications relay services and service providers as follows:

Section (d)(1)(A) requires the FCC to establish functional requirements, guidelines, and operational procedures for the provision of telecommunications relay services. One of these requirements shall be that all carriers subject to this section shall provide telecommunications relay services on a non-discriminatory basis to all users within their serving area. The FCC should pursue means in

which the goals of this section may be met in the most efficient manner. In addition, the Commission should include specific language requiring that operators be sufficiently trained so as to effectively meet the specialized communications needs of individuals with hearing and speech impairments, including sufficient skills in typing, grammar and spelling.

Section (d)(1)(B) requires the FCC to establish minimum federal standards to be met by all providers of intrastate and interstate telecommunications relay services including technical standards, quality of service standards, and the standards that will define functional equivalence between telecommunications relay services and voice telephone transmission services. Telecommunications relay services are to be governed by standards that ensure that telephone service for hearing- and speech-impaired individuals is functionally equivalent to voice services offered to hearing individuals. In determining factors necessary to establish functional equivalency, the FCC should include, for example, the requirement that telecommunications relay services transmit messages between the TDD and voice caller in real time, as well as the requirement that blockage rates for telecommunications relay services be no greater than standard industry blockage rates for voice telephone services. Other factors that should be included are the opportunity for telecommunications relay service users to choose an interstate carrier whenever possible. The FCC should enumerate other such measurable standards to ensure that hearing and non-hearing individuals have equivalent access to the Nation's telephone networks.

Section (d)(1)(C) requires that such telecommunications relay services operate 24 hours a day, seven days a week.

Section (d)(1)(D) requires that users of telecommunication relay services pay rates no greater than the rates paid for functionally equivalent voice communication with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination. Although the Committee commends states that have chosen to implement a discount, this section is not intended to mandate a rate discount with respect to all duration.

Section (d)(1)(E) prohibits relay operators from refusing calls or limiting the length of calls that use such relay services.

Section (d)(1)(F) prohibits relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of that call. The Committee recognizes that printed records of such calls may be necessary to complete the call however, this requirement is to ensure that records are not kept after termination of the conversation. In addition, the Committee recognizes that it may be technically impossible today to relay recorded messages in their entirety because TDDs can only transmit messages at a give speed. In these situations, a hearing- or speech-impaired individual should be given the option to have the message summarized.

Section (d)(1)(G) prohibits relay operators from intentionally altering any relayed conversation.

Section (d)(2) requires that the FCC ensure that regulations prescribed to implement this section encourage the use of state-of-the-art technology. Such regulations should not have the effect of freez-

ing technology or thwarting the introduction of a superior or more efficient technolgy.

Section (d)(3) states that the Commission should issue regulations to govern the separation of costs for the services provided pursuant to this section. No change to the procedures for allocating joint costs between the interstate and intrastate jurisdictions as set forth elsewhere in the Communications Act of 1934 is intended.

Section (d)(4) prohibits the Commission from allowing the imposition of a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunications relay services. However, the manner in which the costs of providing intrastate telecommunications relay services are recovered is left to the discretion of certified states. It is the Committee's expectation that the costs of providing such services will be considered a legitimate cost of doing business and therefore a recoverable expense through the regulatory ratemaking process.

Section (d)(5) grants the FCC flexibility to extend the date of full compliance with the requirements of this Section by one year for any carrier or group of carriers that it finds will be unduly burdened. Interested parties should be given an opportunity to comment on any such request for an extension and such requests should not be granted without compelling justification.

Enforcement

Section (e)(1) requires that the Commission enforce the requirements of this section subject to subsections (f) and (g). The Committee intends that the FCC have sufficient enforcement authority to ensure that telecommunications relay services are provided nationwide and that certain minimum federal standards are met by all providers of the service. The FCC's authority over the provision of intrastate telecommunications relay services, however, is expressly limited by certification procedures required to be established under subsection (f) whereby a state retains jurisdiction over the intrastate provision of telecommunications relay services.

Section (e)(2) requires that the Commission resolve any complaint by final order within 180 days after that complaint has been filed.

Certification

Sections (f)(1) and (2) describe the state certification procedure whereby states may apply to reassert jurisdiction over the provision of intrastate telecommunications relay services. The FCC may grant certification upon a showing that such services are being made available in the state and that they comply with the federal guidelines and standards promulgated pursuant to section (d). A state plan may make service available through the state itself, through designees or through regulation of intrastate carriers.

Section (f)(3) states that, except for reasons affecting rules promulgated pursuant to section (d), the FCC may not deny certification to a state based solely on its chosen method of funding the provision of intrastate telecommunications relay services. Section (d), however, would require that a state program not include cost recovery mechanisms that would have the effect of requiring users of telecommunications relay services to pay effectively higher rates than those paid for functionally equivalent voice communications

services. Additionally, the Committee urges that because this service is of benefit to all society that any funding mechanism not be labeled so as to unduly prejudice the hearing- and speech-impaired community.

Section (f)(4) allows for the Commission to revoke such certification, if after notice and opportunity for hearing, the Commission determines that certification is no longer warranted.

Complaint

Section (g)(1) states that when a complaint is filed with the Commission that alleges a violation of this section with respect to the provision of intrastate telecommunication relay services, the Commission shall refer such complaint to the appropriate State commission if that State has been duly certified by the FCC pursuant to section (f). If the appropriate State has not been duly certified, then the Commission will handle the complaint pursuant to sections (e) (1) and (2).

Once a complaint has been properly referred to a State Commission, subsection (g)(2) permits the FCC to exercise its jurisdiction over such a complaint only if final action has not been taken within 180 days after the complaint is filed with the State, or within a shorter period as prescribed by the regulations of such State, or if the Commission determines that a State program no longer qualifies for certification under section (f).

TITLE V—MISCELLANEOUS PROVISIONS

Construction

Section 501 of the legislation specifies the relationship between this legislation and the Rehabilitation Act of 1973 and other Federal, State or local laws. Section 501 also specifies the relationship between this legislation and the regulation of insurance.

With respect to the Rehabilitation Act of 1973, section 501(a) of the legislation specifies that nothing in this legislation should be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by the Federal agencies pursuant to such title.

With respect to other laws, section 501(b) of the legislation specifies that nothing in this legislation should be construed to invalidate or limit any other federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities that are afforded by this legislation. In other words, all of the rights, remedies and procedures that are available to people with disabilities under other federal laws or other state laws (including state common law) are not preempted by this Act. This approach is consistent with that taken in other civil rights laws. The basic principle underlying this provision is that Congress does not intend to displace any of the rights or remedies available under other federal or state laws (including state common law) which provide greater or equal protection to individuals with disabilities. Finally, to the extent that this legislation could be construed to be in conflict with other laws governing spaces or worksites, for example OSHA re-

quirements, the Committee expects the Attorney General to exercise coordinating authority to avoid and eliminate such conflicts.

With respect to insurance, section 501(c) of the legislation specifies that titles I, II and III of this legislation shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefits plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law;

(2) any person or organization covered by this Act from establishing, sponsoring or observing the terms of a bona fide benefit plan which terms are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this Act from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance

provided that points (1), (2), and (3) are not used as a subterfuge to evade the purposes of titles I, II and III of this legislation.

As indicated earlier in this report, the main purposes of this legislation include prohibiting discrimination in employment, public services, and places of public accommodation. The Committee does not intend that any provisions of this legislation should affect the way the insurance industry does business in accordance with the State laws and regulations under which it is regulated.

Virtually all States prohibit unfair discrimination among persons of the same class and equal expectation of life. The ADA adopts tis prohibition of discrimination. Under the ADA, a person with a disability cannot be denied insurance or be subject to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

Because there was some uncertainty over the possible interpretations of the language contained in titles I, II and III, as it applies to insurance, the Committee added section 501(c) to make it clear that this legislation will not disrupt the current nature of insurance underwriting or the current regulatory structure for self-insured employers or of the insurance industry in sales, underwriting, pricing, administrative and other services, claims, and similar insurance related activities based on classification of risks as regulated by the States.

However, the decision to include this section may not be used to evade the protections of title I pertaining to employment, title II pertaining to public services, and title III pertaining to public accommodations beyond the terms of points (1), (2) and (3), regardless of the date an insurance plan or employer benefit plan was adopted.

For example, an employer could not deny a qualified applicant a job because the employer's current insurance plan does not cover the person's disability or because of the increased costs of the insurance.

Moreover, while a plan which limits certain kinds of coverage based on classification of risk would be allowed under this section,

the plan may not refuse to insure, or refuse to continue to insure, or limit the amount, extent, or kind of coverage available to an individual, or charge a different rate for the same coverage solely because of a physical or mental impairment, except where the refusal, limitation, or rate differential is based on sound actuarial principles or is related to actual or reasonably anticipated experience.

For example, a blind person may not be denied coverage based on blindness independent or actuarial risk classification. Likewise, with respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy but cannot be denied coverage for illnesses or injuries unrelated to the preexisting condition.

Specifically, point (1) makes it clear that insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to serve such insurance products.

Point (2) recognizes the need for employers, and/or agents thereof, to establish and observe the terms of employee benefit plans, so long as these plans are based on underwriting or classification of risks.

Point (3) simply clarifies that self-insured plans, which are currently governed by the preemption provisions of the Employment Retirement Income Security (ERISA), are still governed by that preemption provision and are not subject to state insurance laws. Concerns had been raised that points (1) and (2) could be interpreted as affection the preemption provision of ERISA. No such implication is intended. Until the preemption provision of ERISA is modified, these self-insured plans are subject to state law only to the extent determined by the courts in their interpretation of ERISA's preemption provision. Of course, under the ADA, the provisions of these plans must conform with the requirements of ERISA, just as the provisions of other plans must be based on or not inconsistent with State law.

Point (3) provides that persons or organizations covered by the Act may continue to establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that require insurance.

In all cases, points (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of titles I, II and III of the legislation, regardless of the date the insurance plan or employer benefit plan was adopted.

As explained previously in this report, the Committee also wishes to clarify that in its view, as is stated by the U.S. Supreme court, in *Alexander* v. *Choate,* 469 U.S. 287 (1985), employee benefit plans should not be found to be in violation of this legislation under impact analysis simply because they do not address the special needs of every person with a disability, e.g., additional sick leave or medical coverage.

Moreover, this subsection must be read to be consistent with subsection (b) of section 501 pertaining to other Federal and State laws.

In sum, section 501(c) is intended to afford to insurers and employers the same opportunities they would enjoy in the absence of

this legislation to design and administer insurance products and benefit plans in a manner that is consistent with basic principles of insurance risk classification. This legislation assures that decisions concerning the insurance of persons with disabilities which are not based on bona fide risk classification be made in conformity with non-discrimination requirements. Without such a clarification, this legislation could arguably find violative of its provisions any action taken by an insurer or employer which treats disabled persons differently under an insurance or benefit plan because they represent an increased hazard of death or illness.

The provisions recognize that benefit plans (whether insured or not) need to be able to continue business practices in the way they underwrite, classify, and administer risks, so long as they carry out those functions in accordance with accepted principles of insurance risk classification.

Prohibition against retaliation and coercion

Section 502(a) of the legislation specifies that no individual shall discriminate against any other individual because such other individual has opposed any act or practice made unlawful by this Act or because such other individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Section 502(b) of the legislation specifies that it shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by this legislation. The Committee intends that the interpretation given by the Department of Housing and Urban Development to a similar provision in the Fair Housing Act, see 54 Fed. Reg. 3291, sec. 100.400(c)(1), be used as a basis for regulations for this section.

Section 502(c) of the legislation specifies that the remedies and procedures available under section 107, 205, and 308 shall be available to aggrieved persons for violations of subsections (a) and (b).

State immunity

Section 503 of the legislation specifies that a State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal court for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

This provision is included in order to comply with the standards for covering states set forth in *Atascadero State Hospital* v. *Scanlon*, 105 S. Ct. 3142 (1985).

Regulations by the Architectural and Transportation Barriers Compliance Board

Section 504 specifies that not later than 6 months after the date of enactment of this Act, the Architectural and Transportation

Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of titles II and III.

These guidelines shall establish additional requirements, consistent with this Act, to ensure that buildings, facilities, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

The Minimum Guidelines and Requirements for Accessible Design (MGRAD), as issued and revised by the Board have provided guidance to four Federal standard-setting agencies (the General Services Administration, the Department of Defense, the Department of Housing and Urban Development, and the U.S. Postal Service) in their regulations establishing the Uniform Federal Accessibility Standards (UFAS).

The ADA directs the Board to issue supplemental guidelines and requirements to guide two additional Federal standard-setting agencies—the Department of Transportation and the Department of Justice—in their development of regulations under this legislation.

The development of supplemental MGRAD will require the Board to complete and expand its previous guidelines and requirements. There are some areas within the Board's MGRAD authority in which it has not yet issued minimum guidelines. One such example is the area of recreation. In 1985, the Federal Government Working Group on Access to Recreation developed for the Board a technical paper titled, "Access to Outdoor Recreation Planning and Design," including technical requirements and specific guidelines, but the Board has not officially issued minimum guidelines and requirements in this area. The Committee expects the Board to take prompt action to complete the filling of such gaps in the existing MGRAD.

In issuing the supplemental minimum guidelines and requirements called for under this legislation, the Board should consider whether other revisions or improvements of the existing MGRAD (including scoping provisions) are called for to achieve consistency with the intent and the requirements of this legislation. Particular attention should be paid to providing greater guidance regarding communication accessibility.

In no event shall the minimum guidelines issued under this legislation reduce, weaken, narrow, or set less accessibility standards than those included in existing MGRAD.

This legislation also explicitly provides that the Board is to develop minimum guidelines for vehicles. The Committee intends that the Board shall issue minimum guidelines regarding various types of conveyances and means of transport that come within the gambit of titles II and III of the legislation. Such guidelines should include specifications regarding wheelchair lifts and ramps on vehicles where necessary for boarding and getting off. For example, lifts on buses must be designed to be usable in a safe manner, by persons with mobility impairments who use canes, crutches and walkers in addition to those who use wheelchairs. Therefore, lifts must have railings or other devices for safe use by persons who stand and/or walk with assistance. The Board should also review its minimum guidelines regarding stations and other places of

boarding or departure from vehicles to make sure that they are coordinated with and complementary to the minimum guidelines regarding vehicles.

The Committee also added a specific provision to deal with the concerns of historic properties. Under the new provision, the guidelines issued by the Architectural and Transportation Barriers Compliance Board are required to include requirements for alterations that will threaten or destroy the historical significance of qualified historic buildings and facilities as defined in the Uniform Federal Accessibility Standards 4. 1. 7(1)(a). The provision further requires that, regarding alterations of buildings or facilities covered by the requirements of section 106 of the National Historic Preservation Act of 1966, the guidelines issued shall at a minimum maintain the procedures and standards established in the Uniform Federal Accessibility Standards 4. 1. 7(1) and (2), and that, regarding alterations of qualified historic buildings designated as historic under a statute of the appropriate state or local government body, the guidelines shall establish procedures equivalent to those established by the Uniform Federal Accessibility Standards 4. 1. 7(1)(b) and (c) and shall require, at a minimum, compliance with the minimum requirements established in Uniform Federal Accessibility Standards 4. 1. 7(2).

Attorneys' fees

Section 505 specifies that in any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual. Litigation expenses include the costs of experts and the preparation of exhibits. It is intended that the term "prevailing party" be interpreted consistently with other civil rights laws. Plaintiffs should not be assessed opponents' attorneys' fees unless a court finds the plaintiff's claim is "frivolous, unreasonable, or groundless." See *Christianburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978). The provision specifically includes "litigation expenses" under the rubric of attorneys' fees (and not under "costs") so that the expenses of experts, paralegal, etc. are governed by the *Christianburg Garment* standard regarding the assessment of such expenses against a plaintiff.

Technical assistance

Section 506 specifies that not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with the Secretary of Transportation, the Chairman of the Federal Communications Commission, and the Secretary of Commerce, shall develop and implement a plan to assist entities covered under this legislation in understanding the responsibilities of such entities under this Act. The plan shall be published for comment in accordance with the Administrative Procedure Act. Those individuals responsible for implementing this plan for each title are specified in the Act.

Each department or agency that has responsibility for implementing this Act may render technical assistance to individuals and institutions that have rights or responsibilities under this Act.

The Act provides that each department or agency ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or responsibilities under the Act no later than six months following the publication of final regulations for titles I, II, III, and IV of the Act. Each such department or agency may make grants or enter into contracts with individuals and profit and nonprofit institutions to effectuate the purposes of this Act. Such grants and contracts may be designed to ensure wide dissemination of information about the rights and duties established by the Act and to provide information and technical assistance about techniques for effective compliance with this Act.

Failure to receive technical assistance in no event excuses entities from meeting the requirements of the Act.

Federal wilderness areas

Section 507 requires the National Council on Disability to conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act.

Transvestites

Section 508 provides that an individual who is a transvestite is not an individual with a disability under this Act solely on the basis of being a transvestite.

Congressional inclusion

Section 509 provides that Congress is covered under all the provisions of this Act. For purposes of employment in the House of Representatives, the provision provides that the remedies and procedures of the Fair Employment Practices Resolution shall be used.

Illegal drug use

Section 510(a) and (b) provides that, for purposes of public services, public accommodations, transportation and telecommunications services, an individual who currently uses illegal drugs is not protected against discrimination if the covered entity takes action against the individual on the basis of his or her current illegal drug use. This section applies the same standard that is set forth in Section 104 of Title I and discussed in the section of this report explaining that title.

Section 510(c) provides that a person who currently uses illegal drugs cannot be denied health and social services if he or she is otherwise entitled to such services. Thus, health and mental health care providers, vocational rehabilitation and other programs that provide rehabilitation services cannot deny such services solely because an individual currently uses illegal drugs. The Committee recognizes that such services are essential to provide for the treatment of, and promote the recovery of, drug dependent persons.

Definitions

Section 511 includes a list of conditions that are not considered disabilities under this Act. Homosexuality and bisexuality were never considered impairments under this Act and therefore were never covered as disabilities. This provision simply makes the point clear in order to allay any possible concerns that have been raised. The other conditions listed are physical or mental impairments and could have been covered under this Act absent this provision. However, under this provision, the listed conditions are now excluded as disabilities. The Committee wishes to note, however, that if a person with one of the listed conditions also has another disability, which is still covered under this Act, and the person is discriminated against on the basis of the covered disability, that discriminatory act is still prohibited.

Amendments to the Rehabilitation Act

Section 512 amends the Rehabilitation Act of 1973 as it applies to individuals who currently use illegal drugs. The Rehabilitation Act presently protects these individuals against discrimination as long as they are qualified to participate in the activity at issue or are qualified to perform the job and do not present a direct threat to property or the safety of others. Section 512 amends this standard so that the treatment of persons who currently use illegal drugs is parallel to sections 104 and 510 of the ADA. Section 512, however, does not amend the existing Rehabilitation Act standard for individuals with current alcohol problems.

Severability

Section 513 provides that if any provision of this Act is found to be unconstitutional, it shall be severed from the remainder of the Act and the rest of the Act shall remain in force.

VII. Oversight Findings of the Committee on Government Operations

In compliance with clause 2(l)(3)(D) of Rule XI of the Rules of the House of Representatives, no findings or recommendations from the Committee on Government Operations were submitted to the Committee with reference to the subject matter specifically addressed by this legislation.

VIII. Oversight Findings of the Committee

With reference to clause 2(l)(4) of Rule XI of the Rules of the House of Representatives, the Committee's oversight findings are set forth in the "Hearings" and "Need for the Legislation" sections of this report.

IX. Congressional Budget Office Estimate

In compliance with clause 2(l)(3)(C) of Rule XI of the Rules of the House of Representatives, the estimate prepared by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974, submitted prior to the filing of this report, is set forth as follows:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, December 21, 1989.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Committee on Education and Labor,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 2273, the Americans with Disabilities Act of 1989, as ordered reported by the Committee on Education and Labor on November 14, 1989. The bill would require several federal agencies to establish regulations and standards to implement the legislation. We estimate the costs of these activities to be $3 million in fiscal year 1990, $7 million in 1991, $19 million in 1992, $31 million in 1993, and $31 million in 1994, assuming appropriations of the necessary funds.

Enactment of H.R. 2273 would result in substantial costs for state and local governments, but CBO cannot estimate the total impact with any certainty. Most of these costs would involve actions required to make public transit systems accessible to the handicapped. As a result of this bill, we estimate that transit operators would have to spend $20 million to $30 million per year to purchase additional accessible buses and about $15 million per year by 1994 for additional maintenance costs. The bill would also mandate expanded paratransit service, which could result in significant costs, but uncertainties about implementation of this requirement and demand for these services makes these costs very difficult to estimate. Further, the cost of complying with the bill's requirement to make existing transit facilities accessible to the handicapped would probably reach several hundred million dollars over the next twenty years. Some local governments might incur additional costs to make newly-constructed public buildings accessible, as required by this bill, but most already face similar requirements. We could not determine how many localities would be affected by this provision.

If enacted, H.R. 2273 would prohibit discrimination against people with disabilities in areas such as employment practices, public accommodations and services, transportation services and telecommunication services. H.R. 2273 would require that the Equal Employment Opportunities Commission, the Attorney General, the Secretary of Transportation, the Architectural and Transportation Barriers Compliance Board, and the Federal Communications Commission develop and issue regulations and standards for implementation and enforcement of this act.

IMPACT ON THE FEDERAL BUDGET

Equal Employment Opportunities Commission (EEOC)

Title I—Employment—would prohibit discrimination by employers against qualified individuals with disabilities. H.R. 2273 would require the EEOC to issue regulations to carry out Title I and to provide for enforcement of the provisions. In addition, the EEOC would ensure the availability of a technical assistance manual to those entities with rights of responsibilities under this act. Although no specific authorization level is stated in the bill, CBO esti-

mates the cost of these activities would be $0.5 million in fiscal year 1990, $2.5 million in fiscal year 1991, $14.7 million in fiscal year 1992, and $27 million annually in fiscal years 1993-94. This estimate is based on the EEOC's past experience with enforcing civil rights standards and assumes that approximately 259 additional full-time equivalent employees would be needed for the Commission's 50 field offices and that approximately 58 additional staff would be needed for the EEOC headquarters.

Department of Transportation

H.R. 2273 would direct the Secretary of Transportation to issue regulations within one year including standards applicable to the facilities and vehicles covered by these provisions. Also, the Secretary of Transportation would make available technical assistance manuals to those with rights and responsibilities under this act. CBO estimates that the cost to the federal government of developing these regulations and manuals would be about $0.5 million during fiscal years 1990 and 1991. In addition, the federal government might bear some part of the costs of making transit services accessible to the handicapped, which are discussed below. The capital and operating costs of most mass transit systems are heavily subsidized by the federal government through grants by the Urban Mass Transportation Administration. We cannot predict the extent to which these grants might be increased to compensate for the additional costs attributable to H.R. 2273.

Architectural and Transportation Barriers Compliance Board

H.R. 2273 would require the board to issue minimum guidelines that would supplement existing minimum guidelines for accessible design of buildings, facilities and vehicles. Although no specific authorization level is stated in the bill, CBO estimates the cost of these guidelines would be $0.2 million in fiscal year 1990. This estimate is based upon salaries and expense costs of $104,000 and research contracts costs of $80,000. Although the bill does not state specifically that the guidelines should be maintained, the board currently maintains the existing guidelines and most likely would maintain the new guidelines. CBO estimates the cost of maintaining the guidelines would be $0.2 million every other year beginning in fiscal year 1992.

Office of Technology Assessment (OTA)

The OTA would be required to undertake a study to determine (1) the needs of individuals with disabilities with regards to buses and (2) a cost-effective method for making buses accessible and usable by those with disabilities. In conjunction with this study, the OTA is directed to establish an advisory committee to assist with and review the study. Although no specific authorization level is stated in the bill, CBO estimates the cost of the study and advisory committee would be $0.1 million in fiscal year 1990, $0.3 million in 1991, and $0.1 million in 1992. This estimate is based upon the assumption that the OTA will not have to conduct significant additional field research.

Department of Justice

H.R. 2273 also would require the Attorney General to develop regulations to carry out sections 201 and 202 of Title II—Public Services—and to investigate alleged violations of Title III—Public Accommodations—which includes undertaking periodic reviews of compliance of covered entities under Title III. These regulations would ensure that a qualified individual with a disability would not be excluded from participation in, or denied benefits by a department, agency, special purpose district or other instrumentality of a state or local government. In addition, H.R. 2273 would require the Department of Justice to make available technical assistance manuals to those with rights and responsibilities under this act. We estimate the cost of these activities would be $2 million in fiscal year 1990 and $4 million annually in fiscal years 1991-1994.

Federal Communications Commission (FCC)

H.R. 2273 requires the FCC to prescribe and enforce regulations with regards to telecommunications relay services. These regulations include: (1) establishing functional regulations, guidelines and operations for telecommunications relay services, (2) establishing minimum standards that shall be met by common carriers, and (3) ensuring that users of telecommunications relay services pay rates no greater than rates paid for functionally equivalent voice communication services with respect to duration of call, the time of day, and the distance from point of origination to point of termination. In addition, H.R. 2273 would require the FCC to make available technical assistance manuals to those with rights and responsibilities under this act. While no authorization level is stated, CBO estimates the cost of developing and enforcing these regulations to be $0.1 million in fiscal year 1990, $0.1 million in fiscal year 1991, $0.2 million in 1992, $0.2 million in 1993, and $0.1 million in 1994.

National Council on Disability

H.R. 2273 would require the council to conduct a study on the effect that wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System. Although no authorization level is stated, CBO estimates the cost of this study would be $0.1 million in fiscal year 1990 and $0.2 million in fiscal year 1991.

COSTS TO STATE AND LOCAL GOVERNMENTS

Public buildings

H.R. 2273 would mandate that newly constructed state and local public buildings be made accessible to the handicapped. All states currently mandate accessibility in newly constructed state-owned public buildings and therefore would incur little or no costs if this bill were to be enacted. It is possible, however, that some local governments may not have such requirements. These municipalities would incur additional costs for making newly-constructed, locally-owned public buildings accessible if this bill were to become law. According to a study conducted by the Department of Housing and Urban Development in 1978, the cost of making a building accessible to the handicapped is less than one percent of total construc-

tion costs. This estimate assumes that the accessibility features are included in the original building design. Otherwise, the costs could be much higher.

Public transit

CBO cannot provide a comprehensive analysis of the impact of H.R. 2273 on mass transit of state and local governments. The scope of the bill's requirements in this area is very broad, many provisions are subject to interpretation, and the potential effects on transit systems are significant and complex. While we have attempted to discuss the major potential areas of cost, we cannot assign a total dollar figure to these costs.

H.R. 2273 would require that all new buses and rail vehicles be accessible to handicapped individuals, including those who use wheelchairs, and that public transit operators offer paratransit services as a supplement to fixed route public transportation. In addition, the bill includes a number of requirements relating to the accessibility of mass transportation facilities. Specifically, all new facilities, alterations to existing facilities, intercity rail stations, and key stations in rapid rail, commuter rail, and light rail systems would have to be acccessible to handicapped persons.

Bus and paratransit services.—CBO estimates that it would cost between $20 million and $30 million a year over the next several years to purchase additional lift-equipped buses as required by H.R. 2273. Additional maintenance costs would increase each year as lift-equipped buses are acquired, and would reach $15 million by 1994. The required paratransit systems would add to those costs.

Based on the size of the current fleet and on projections of the American Public Transit Association (APTA), CBO expects that public transit operators will purchase about 4,300 buses per year, on average, over the next five years. About 37 percent of the existing fleet of buses is currently equipped with lifts to make them accessible to handicapped individuals and, based on APTA projections, we estimate that an average of 55 percent to 60 percent of future bus purchases will be lift-equipped in the absence of new legislation. Therefore, this bill would require additional annual purchases of about 1,900 lift-equipped buses. Assuming that the added cost per bus for a lift will be $10,000 to $15,000 at 1990 prices, operators would have to spend from $20 million to $30 million per year, on average, for bus acquisitions as a result of this bill.

Maintenance and operating costs of lifts have varied widely in different cities. Assuming that additional annual costs per bus average $1,500, we estimate that it would cost about $2 million in 1990, increasing to $15 million in 1994, to maintain and operate the additional lift-equipped buses required by H.R. 2273.

In addition, bus fleets may have to be expanded to make up for the loss in seating capacity and the increase in boarding time needed to accommodate handicapped persons. The cost of expanding bus fleets is uncertain since the extent to which fleets would need to be expanded depends on the degree to which handicapped persons would utilize the new lift-equipped buses. If such use increases significantly, added costs could be substantial.

These costs are sensitive to the number of bus purchases each year, which may vary considerably. In particular, existing Environmental Protection Agency emissions regulations may result in accelerated purchases over the next two years as operators attempt to add to their fleets before much more stringent standards for new buses go into effect. Such variations in purchasing patterns would affect the costs of this bill in particular years. In addition, these estimates reflect total costs for all transit operators, regardless of their size. Costs may fall disproportionately on smaller operators, who are currently more likely to choose options other than lift-equipped buses to achieve handicapped access.

The bill also requires transit operators to offer paratransit or other special transportation services providing a level of service comparable to their fixed route public transportation to the extent that such service would not impose an "undue financial burden." Because we cannot predict how this provision will be implemented, and because the demand for paratransit services is very uncertain, we cannot estimate the potential cost of the paratransit requirement, but it could be significant. The demand for paratransit services probably would be reduced by the greater availability of lift-equipped buses.

Transit Facilities—We expect that the cost of compliance with the provisions concerning key stations would be signficant for a number of transit systems and could total several hundred million dollars (at 1990 prices) over twenty years. The precise level of these costs would depend on future interpretation of the bill's requirements and on the specific options chosen by transit systems to achieve accessibility. The costs properly attributable to this bill would also depend on the degree to which transit operators will take steps to achieve accessibility in the absence of new legislation.

In 1979, CBO published a study, "Urban Transportation for Handicapped Persons: Alternative Federal Approaches," (November 1979) that outlined the possible costs of adapting rail systems for handicapped persons. In that study, CBO estimated that the capital costs of adapting key subway, commuter and light rail stations and vehicles for wheelchair users would be $1.1 billion to $1.7 billion, while the additional annual operating and maintenance costs would be $14 million to $21 million.

Based on a 1981 survey of transit operators, the Department of Transportation has estimated that adapting existing key stations and transit vehicles would require additional capital expenditures of $2.5 billion over 30 years and would result in additional annual operating costs averaging $57 million (in 1979 dollars) over that period. Many groups representing the handicapped asserted that the assumptions and methodology used by the transit operators in this survey tended to overstate these costs severely. The department estimated that the cumulative impact of using the assumptions put forth by these groups could lower the total 30-year costs to below $1 billion.

CBO believes that the figures in both these studies significantly overstate the cost of the requirements of H.R. 2273, because, in the intervening years, several of the major rail systems have begun to take steps to adapt a number of their existing stations for handicapped access. In addition, it seems likely that the number of sta-

tions that would be defined as "key" under this bill would be much lower than that assumed in either of those studies. Furthermore, the Metropolitan Transit Authority in New York and the Southeastern Pennsylvania Transportation Authority in Philadelphia, two large rail systems, have entered into settlement agreements with handicapped groups that include plans for adaptation of key stations. These plans would probably satisfy the bill's requirement for accessibility of key stations. Other rail systems are also taking steps to make existing stations accessible. Therefore, we expect that the cost of the bill's requirements concerning key stations would probably not be greater than $1 billion (in 1990 dollars) and might be considerably less.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Cory Leach (226-2820) and Marjorie Miller (226-2860).

Sincerely,

ROBERT D. REISCHAUER,
Director.

X. COMMITTEE ESTIMATE

With reference to the statement required by clause 7(a)(1) of Rule XIII of the Rules of the House of Representatives, the Committee accepts the estimate prepared by the Congressional Budget Office.

XI. INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, it is the Committee's estimate that enactment of this legislation will have no significant impact on prices and costs in the operation of the national economy. Indeed, the civil rights guaranteed under this legislation will contribute to enhanced productivity, utilization of services, and cost savings in other social programs.

XII. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This Act may be cited as the "Americans with Disabilities Act of 1989."

Section 2. Findings and purposes

The purpose of the Act is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities; provide enforceable standards addressing discrimination against individuals with disabilities, and ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

Section 3. Definitions

The term "disability" is defined to mean, with respect to an individual, a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such an impairment, or being regarded as having such an impairment. This is the same definition used for purposes of sections

501, 503 and 504 of the Rehabilitation Act of 1973 and the 1988 amendments to the Fair Housing Act.

TITLE I—EMPLOYMENT

Section 101. Definitions

The provisions in Title I of the bill use or incorporate by reference many of the definitions in Title VII of the Civil Rights Act of 1964 (employee, employer, Commission, person, labor organization, employment agency, joint labor-management committee, commerce, industry affecting commerce). For the first two years after the effective date of the Act, only employers with 25 or more employees are covered. Thereafter, employers with 15 or more employees are covered. The terms "illegal drug" and "qualified individual with a disability" are also defined. The term "undue hardship" is defined, and among the specified factors to be considered are the overall financial resources available to a covered entity and those available to its covered facility, the type of operation or operations maintained by the covered entity, including the composition and structure of the entity's workforce, and the nature and cost of a needed accommodation.

Section 102. Discrimination

Using the section 504 legal framework as the model, the bill specifies that no entity covered by the Act shall discriminate against any qualified individual with a disability because of such individual's disability in regard to application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Discrimination includes, for example: limiting, segregating, or classifying a job applicant or employee in a way that adversely affects his or her opportunities or status; participating in contractual or other arrangements that have the effect of subjecting individuals with disabilities to discrimination; and using standards, criteria or methods of administration that have a discriminatory effect or perpetuate discrimination of others subject to common administrative control.

In addition, discrimination includes excluding or denying equal opportunities to a qualified nondisabled individual because of the known disability of an individual with whom the qualified individual is known to have relationship or association.

Discrimination also includes not making reasonable accommodations to the known limitations of a qualified individual with a disability unless such entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business. Discrimination also includes the denial of employment opportunities because a qualified individual with a disability needs a reasonable accommodation.

The definition of the term "reasonable accommodation" included in the bill is comparable to the definition in the section 504 legal framework. The term includes: making existing facilities accessible, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment

or devices, appropriate adjustment or modifications of policies, examinations, and training materials, the provision of qualified readers and interpreters, and other similar accommodations.

Discrimination also includes the imposition or application of tests and other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test or other selection criteria is shown to be job-related for the position in question and is consistent with business necessity.

The bill also includes the pre-employment inquiries provision from section 504 which permits employers to make preemployment inquiries into the ability of an applicant to perform job-related functions but prohibits inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability. Employers are permitted to undertake post-offer/pre-entrance medical examinations so long as the results are kept confidential, all entering employees take the examinations, and the results are used only in accordance with the provisions of the title.

The bill also prohibits employers from requiring medical examinations and making inquiries as to whether an employee has a disability or as to the nature or severity of the disability unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Section 103. Defenses

The bill also specifies several defenses to charges of discrimination under the Act. First, an employer can show that a qualification standard, test, or selection criteria that screens out or tends to screen out or otherwise deny a job or benefit to an individual with a disability is job-related and consistent with business necessity, and that such performance cannot be accomplished by reasonable accommodation as required under this title. Second, as a subset of the first defense, an employer need not hire or retain an employee who it shows has a currently contagious disease or infection that poses a direct threat to the health or safety of other individuals in the workplace.

With respect to religious entities, the bill adopts the religious preference provision from Title VII of the Civil Rights Act of 1964 and includes a religious tenet exemption which provides that a religious organization may require, as a qualification standard to employment, that all applicants and employees conform to the religious tenets of such organization.

Section 104. Illegal drugs and alcohol

Current users of illegal drugs are not considered individuals with disabilities and thus are not protected under the Act. Individuals who are in or who have completed a rehabilitation program, and who are no longer current users of illegal drugs, continue to be protected. Tests for illegal drug use are not considered medical examinations under the Act. Finally, an employer may prohibit the use of alcohol or illegal drugs at the workplace by all employees; may require that employees not be under the influence of alcohol or illegal drugs at the workplace; may require that employees conform

their behavior to requirements established pursuant to the Drug-Free Workplace Act; and may hold a drug user or alcoholic to the same qualification standards for employment or job performance and behavior to which it holds other individuals, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such individual.

Section 105. Posting notices

Consistent with title VII of the Civil Rights Act of 1964, every covered entity must post notices in an accessible format describing the applicable provisions of this Act.

Section 106. Regulations

The Commission is directed to promulgate regulations within one year in an accessible format.

Section 107. Enforcement

The bill incorporates by reference the remedies and procedures set out in sections 706, 707, 709, and section 710 of title VII of the Civil Rights Act of 1964.

Section 108. Effective date

The effective date of Title I is 24 months after the date of enactment.

TITLE II—PUBLIC SERVICES

Section 201. Definition

A "qualified individual with a disability" means an individual who, with or without reasonable modifications to rules, policies or practices, or the removal of architectural, communication, or transportation barriers or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a department, agency, special purpose district, or other instrumentality of a State or a local government.

Section 202. Discrimination

Section 504 only applies to entities receiving Federal financial assistance. Title II of the bill makes all activities of State and local governments subject to the types of prohibitions against discrimination against a qualified individual with a disability included in section 504 (nondiscrimination).

Section 203. Actions applicable to public transportation provided by public entities considered discriminatory

New fixed route buses of any size, rail vehicles and other fixed route vehicles for which a solicitation is made later than 30 days after the date of enactment of this Act must be readily accessible to and usable by individuals with disabilities. No retrofitting of existing buses is required.

Used vehicles purchased or leased after the date of enactment need not be accessible but a demonstrated good faith effort to locate a used accessible vehicle must be made.

Vehicles that are remanufactured so as to extend their usable life for five years or more must, to the maximum extent feasible, be readily accessible to and usable by individuals with disabilities.

In those communities with fixed route public transportation, there must also be a paratransit system to serve those individuals with disabilities who cannot use the fixed route public transportation and to other individuals associated with such individuals in accordance with service criteria established by the Secretary of Transportation. Communities need not make expenditures that would result in an undue financial burden.

Communities that operate a demand responsive system that is used to provide public transportation for the general public (nondisabled and disabled) must purchase new buses for which a solicitation is made 30 days after the date of enactment of the Act that are accessible unless the system can demonstrate that the system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to that provided to the general public; in which case all newly purchased vehicles need not be accessible.

All new facilities used to provide public transportation services must be readily accessible to and usable by individuals with disabilities.

When alterations are made to existing facilities that affect or could affect the usability of the facility, the alterations, the path of travel to the altered area, the bathrooms, telephones, and drinking fountains serving the remodeled area must be, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities. This obligation to make the path of travel accessible only applies where the covered entity undertakes major structural modification.

All stations in intercity rail systems must be accessible within 20 years and key stations in rapid rail, commuter rail and light rail systems must be made readily accessible as soon as practicable but in no event later than 3 years after the date of enactment of this Act except that the time limit may be extended by the Secretary of Transportation up to 20 years for extraordinary expensive structural changes to, or replacement of, existing facilities necessary to achieve accessibility.

Intercity, light rail, rapid, and commuter rail systems must have at least one car per train that is accessible as soon as practicable, but in any event in no less than five years.

Section 204. Regulations

The bill directs the Attorney General to promulgate regulations within one year in an accessible format that implement the provisions generally applicable to state and local governments. These regulations must be consistent with the coordination regulations issued in 1978 that governed the regulations applicable to recipients of Federal financial assistance, except with respect to "existing facilities" and "communications," in which case the Federally conducted regulations apply.

Within one year from the date of enactment, the Secretary of Transportation is directed to issue regulations in an accessible format that include standards which are consistent with minimum

guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board.

Section 205. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 shall be available to any individual who believes he or she is being subjected to discrimination on the basis of disability in violation of this Act, or regulations promulgated under section 204, concerning public services.

Section 206. Effective date

The effective date of Title II is eighteen months from the date of enactment with the exception of the provision applicable to the purchase of new buses, which takes effect on the date of enactment.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

Section 301. Definitions

The terms "commerce", "commercial facilities", and "public transportation" are defined. The term "readily achievable" is defined to mean "easily accomplishable and able to be carried out without much difficulty or expense". Factors to be considered in considering whether an action is to be considered in considering whether an action is "readily achievable" are analogous to those listed in determining whether an action is an "undue hardship" in Title I.

The bill lists categories of establishments that are considered public accommodations. The list includes but is not limited to restaurants, hotels, doctors' offices, pharmacists, grocery stores, museums, and homeless shelters. The list does not include religious institutions or entities controlled by religious institutions.

Section 301. Prohibition of discrimination by public accommodations

The bill includes general and specific categories of discrimination prohibited by the Act. In general, it is considered discriminatory to subject an individual or class or individuals, directly or indirectly, on the basis of disability, to any of the following:

(1) Denying the opportunity to participate in or benefit from an opportunity;

(2) Affording an opportunity that is not equal to that afforded others;

(3) Providing an opportunity that is less effective than that provided to others;

(4) Providing an opportunity that is different or separate, unless such action is necessary to provide the individuals with an opportunity that is as effective as that provided to others; however, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

Further, an entity may not directly or indirectly use standards or criteria or methods of administration that have the effect of sub-

jecting an individual to discrimination on the basis of disability or perpetuate discrimination by others who are subject to common administrative control or are agencies of the same State. Nor can an entity discriminate against an individual because of the known association of that individual with another individual with a disability.

Specific categories of discrimination include:

The imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability unless such criteria can be shown to be necessary for the provision of the goods or services being offered.

A failure to make reasonable modifications in rules and policies and procedures when necessary to afford meaningful opportunity unless the entity can demonstrate that the modifications would fundamentally alter the nature of the program.

A failure to provide auxiliary aids and services unless the entity can demonstrate that such services would fundamentally alter the nature of the goods or services being offered or would result in an undue burden. Auxiliary aids and services include: qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments; qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments; acquisition or modification of equipment or devices; and other similar services and actions.

A failure to remove architectural barriers and communication barriers that are structural in nature in existing facilities and transportation barriers in existing vehicles where such removal is readily achievable; and, where the entity can demonstrate that such removal is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable.

With respect to a facility that is altered, the failure to make the alterations in a manner that, to the maximum extent feasible, the altered portion, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area are readily accessible to and usable by individuals with disabilities. The obligation to make the path of travel accessible only applies if the facility is making alterations to a primary function area and such changes are not disproportionate to the alterations being undertaken. Further, a covered entity need not install an elevator if the building has fewer than three stories, has fewer than 3,000 square feet per floor unless the building is a shopping mall, shopping center, or the professional office of a health care provider or the Attorney General determines that the category of usage requires an elevator.

A failure by a public accommodation to provide a level of transportation services to individuals with disabilities equivalent to that provided for the general public and a refusal to purchase or lease vehicles that carry in excess of 16 passengers for which solicitations are made later than 30 days after the effective date of the Act which are readily accessible to and usable by individuals with dis-

abilities. Special rules apply to demand responsive systems (e.g., shuttles to and from an airport and hotel).

Section 303. New construction in public accommodations and commercial facilities

With respect to places of public accommodation and commercial facilities, the bill also specifies that discrimination includes a failure to make facilities constructed for first occupancy later than 30 months after the date of enactment readily accessible to and usable by individuals with disabilities except where an entity can demonstrate that it is structurally impracticable to do so in accordance with standards set forth or incorporated by reference in regulations. The elevator exception applicable to alterations is also applicable to new construction.

Section 304. Prohibition of discrimination in public transportation services provided by private entities

The bill includes a specific section prohibiting discrimination in public transportation services (other than air travel) provided by private entities. In general, no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people (but not in the principle business of providing air transportation) and whose operations affect commerce. All such newly purchased buses purchased later than 7 years after the date of enactment, or, in the case of small providers, 6 years after the date of enactment, must be readily accessible to and usable by individuals with disabilities.

Section 305. Study

A study must be completed within 3 years from the date of enactment on how best to achieve the section 304 accessibility requirements for entities using over the road coaches.

Section 306. Regulations

Not later than one year after the date of enactment, the Secretary of Transportation shall issue regulations that shall include standards applicable to fixed route systems and demand response systems and to public transportations services provided by private entities. Not later than one year after the date of enactment, the Attorney General shall issue regulations to carry out the remaining provisions of this title.

Section 307. Exemptions for private clubs and religious organizations

The provisions of this title shall not apply to private clubs or establishments exempted from coverage under title II of the Civil Rights Act of 1964 or to religious organizations or entities controlled by religious organizations, including places of worship.

Section 308. Enforcement

The bill uses the model of title II of the Civil Rights Act of 1964 (injunctive relief) and includes the pattern and practice authority

(including civil penalites) from the recently enacted Fair Housing Act.

Section 309. Effective date

Title III shall become effective 18 months after the date of enactment of this Act.

TITLE IV—TELECOMMUNICATIONS RELAY SERVICES

Section 401. Telecommunications services for hearing-impaired and speech-impaired individuals

Title IV specifies that a common carrier that offers telephone services to the general public must also provide interstate or intrastate telecommunication relay services so that such services provide individuals who use non-voice terminal devices because of their disabilities opportunities for communications that are equivalent to those provided to their customers who are able to use voice telephone services, unless such services are provided pursuant to a State relay program.

Nothing in this title is to be construed to discourage or impair the development of improved or future technology designed to improve access to telecommunications services for individuals with disabilities.

The Federal Communications Commission is directed to issue regulations establishing minimum standards and guidelines for telecommunications relay services.

TITLE V—MISCELLANEOUS PROVISIONS

Section 501. Construction

Nothing in this Act shall be construed to reduce the scope of coverage or apply a lesser standard than the coverage required or the standards applied under title V of the Rehabilitation Act of 1973. Nothing in this Act shall be construed to invalidate or limit the rights, remedies, or procedures of any other Federal law or law of any State or political subdivision of a State that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act. This bill is not to be construed as regulating the underwriting, classifying, or administering of insurance risks.

Section 502. Prohibition against retaliation and coercion

Section 502 contains a prohibition against retaliation and coercion.

Section 503. State immunity

States are not immune under the 11th amendment of the United States Constitution for violations of the Act.

Section 504. Regulations by the Architectural and Transportation Barriers Compliance Board

This section directs the Architectural and Transportation Barriers and Compliance Board to issue minimum guidelines for titles II and III.

Section 505. Attorney's fees

In any action or administrative proceeding commenced under the Act, the court, or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Section 506. Technical assistance

Not later than 180 days after the date of enactment of this Act, the Attorney General, in consultation with specified individuals, shall develop a plan to assist entities covered under this Act, as well as other executive agencies and commissions, in understanding the responsibility of such entities under this Act. This plan shall be published for comment in accordance with the Administrative Procedure Act. Those individuals and agencies responsible for implementing this plan for each title are specified in the Act.

Each department or agency that has responsibility for implementing this Act may render technical assistance to individuals and institutions that have rights or responsibilities under this Act.

Each department or agency shall ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or responsibilities under the Act no later than six months following the publication of final regulations for titles I, II, III, and IV of the Act. Each such department or agency may make grants or enter into contracts with individuals and profit and nonprofit institutions to effectuate the purposes of this Act. Such grants and contracts may be designed to ensure wide dissemination of information about the rights and duties established by the Act and to provide information and technical assistance about techniques for effective compliance with this Act.

Failure to receive technical assistance in no event excuses entities covered under this Act from meeting the requirements of the Act.

Section 507. Federal wilderness areas

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System, and shall issue a report to Congress within one year after the enactment of this Act.

Section 508. Transvestites

For purposes of this Act, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

Section 509. Congressional inclusion

The provisions of this Act shall apply in their entirety to the Senate, the House of Representatives, and all the instrumentalities of the Congress, or either House thereof. The rights and protections under this Act shall apply with respect to any employee in an employment position in the House of Representatives and any employ-

ing authority of the House of Representatives. In the administration of this subsection, the remedies and procedures under the Fair Employment Practices Resolution shall be applied.

Section 510. Illegal drug use

For purposes of this Act, an individual with a disability does not include an individual who is a current user of illegal drugs when the covered entity acts on the basis of such use.

Nothing in this subsection shall be construed to exclude as an individual with a disability an individual who has successfully completed a supervised drug rehabilitation program and is no longer using illegal drugs, or an individual who is participating in such a program and no longer uses illegal drugs, or an individual who is erroneously regarded as using illegal drugs but is not using illegal drugs.

An individual shall not be denied health or social services on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

Section 511. Definitions

This section lists several exclusions from the term "disability".

Section 512. Amendments to the Rehabilitation Act

Provisions summarized in description of section 510 set forth above are applied to the Rehabilitation Act of 1973.

Section 513. Severability

In the event that any provision in this Act is found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the Act, and this action shall not affect the enforceability of the remaining provisions of the Act.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

REHABILITATION ACT OF 1973

* * * * * * *

DEFINITIONS

SEC. 7. For the purposes of this Act:

(1) * * *

* * * * * * *

(8)(A) * * *

(B) [Subject to the second sentence of this subparagraph,] *Subject to subparagraphs (C) and (D),* the term "individual with handicaps" means, for purposes of titles IV and V of this Act, any person who (i) has a physical or mental impairment which substantially

limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. [For purposes of sections 503 and 504 as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.]

(C)(i) For purposes of title V, the term "individual with handicaps" does not include an individual who is a current user of illegal drugs, when a recipient acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with handicaps an individual who—

(I) has successfully completed a supervised drug rehabiliation program and is no longer using illegal drugs, or has otherwise been rehabilitated successfully and is no longer using illegal drugs;

(II) is participating in a supervised rehabilitation program and is no longer using illegal drugs; or

(III) is erroneously regarded as being an illegal drug user but is not using illegal drugs;

except that it shall not be a violation of this Act for a recipient to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual with handicaps is no longer using illegal drugs.

(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under titles I, II, and III, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current use of illegal drugs if he or she is otherwise entitled to such services.

(iv) For purposes of programs and activities providing educational services, local educational agencies may take disciplinary action pertaining to the use or possession of illegal drugs or alcohol against any handicapped student who currently uses illegal drugs or alcohol to the same extent that such disciplinary action is taken against nonhandicapped students. Furthermore, the due process procedures at 34 CFR 104.36 shall not apply to such disciplinary actions.

(v) For purposes of sections 503 and 504 as such sections relate to employment, the term "individual with handicaps" does not include any individual who is an alcoholic whose current use of alcohol prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or the safety of others.

[(C)] *(D)* For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease of infection, is unable to perform the duties of the job.

* * * * * * *

(22) The term "illegal drugs" means controlled substances, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), the possession or distribution of which is unlawful under such Act. Such term does not mean the use of a controlled substance taken under supervision by a licensed health professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

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COMMUNICATIONS ACT OF 1934

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APPLICATION OF ACT

SEC. 2. (a) * * *

(b) Except as provided in [section 223 or 224] *sections 223, 224, and 225* and subject to the provisions of section 301 and title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive, shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

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TITLE II—COMMON CARRIERS

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SPECIAL PROVISIONS RELATING TO TELEPHONE COMPANIES

SEC. 221. (a) * * *

(b) Subject to the provisions of [section 301] *sections 225 and 301,* nothing in this Act shall be construed to apply, or to give the Commission jurisdiction, with respect to charges, classifications, practices, services, facilities, or regulations for or in connection with wire, mobile, or point-to-point radio telephone exchange service, or any combination thereof even though a portion of such exchange service constitutes interstate or foreign communication, in

any case where such matters are subject to regulation by a State commission or by local governmental authority.

* * * * * * *

TELECOMMUNICATIONS SERVICES FOR HEARING-IMPAIRED AND SPEECH-IMPAIRED INDIVIDUALS

SEC. 225. (a) DEFINITIONS.—As used in this section—

(1) COMMON CARRIER OR CARRIER.—The term "common carrier" or "carrier" includes any common carrier engaged in interstate communication by wire or radio as defined in section 3(h), any common carrier engaged in intrastate communication by wire or radio, and any common carrier engaged in both interstate and intrastate communication, notwithstanding sections 2(b) and 221(b).

(2) TDD.—The term "TDD" means a Telecommunications Device for the Deaf, which is a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system.

(3) TELECOMMUNICATIONS RELAY SERVICES.—The term "telecommunications relay services" means telephone transmission services that provide the ability for an individual who has a hearing impairment or speech impairment to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing impairment or speech impairment to communicate using voice communication services by wire or radio. Such term includes services that enable two-way communication between an individual who uses TDD or other nonvoice terminal device and an individual who does not use such a device.

(b) AVAILABILITY OF TELECOMMUNICATIONS RELAY SERVICES.—

(1) IN GENERAL.—In order to carry out the purposes established under section 1, to make available to all individuals in the United States a rapid, efficient nationwide communication service, and to increase the utility of the telephone system of the Nation, the Commission shall ensure that interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States.

(2) REMEDIES.—For purposes of this section, the same remedies, procedures, rights, and obligations under this Act that are applicable to common carriers engaged in interstate communication by wire or radio are also applicable to common carriers engaged in intrastate communication by wire or radio and common carriers engaged in both interstate and intrastate communication by wire or radio.

(c) PROVISION OF SERVICES.—Each common carrier providing telephone voice transmission services shall provide telecommunications relay services individually, through designees, or in concert with other carriers not later than 3 years after the date of enactment of this section.

(d) REGULATIONS.—

(1) IN GENERAL.—The Commission shall, not later than 1 year after the date of enactment of this section, prescribe regulations to implement this section, including regulations that—

(A) establish functional requirements, guidelines, and operations procedures for telecommunications relay services;

(B) establish minimum standards that shall be met by common carriers in carrying out subsection (c);

(C) require that telecommunications relay services operate every day for 24 hours per day;

(D) require that users of telecommunications relay services pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from point of origination to point of termination;

(E) prohibit relay operators from refusing calls or limiting the length of calls that use telecommunications relay services;

(F) prohibit relay operators from disclosing the content of any relayed conversation and from keeping records of the content of any such conversation beyond the duration of the call; and

(G) prohibit relay operators from intentionally altering a relayed conversation.

(2) TECHNOLOGY.—The Commission shall ensure that regulations prescribed to implement this section encourage the use of existing technology and do not discourage or impair the development of improved technology.

(3) JURISDICTIONAL SEPARATION OF COSTS.—

(A) IN GENERAL.—The Commission shall prescribe regulations governing the jurisdictional separation of costs for the services provided pursuant to this section.

(B) RECOVERING COSTS.—Such regulations shall generally provide that costs caused by interstate telecommunications relay services shall be recovered from the interstate jurisdiction and costs caused by intrastate telecommunications relay services shall be recovered from the intrastate jurisdiction.

(C) JOINT PROVISION OF SERVICES.—To the extent interstate and intrastate common carriers jointly provide telecommunications relay services, the procedures established in section 410 shall be followed, as applicable.

(4) FIXED MONTHLY CHARGE.—The Commission shall not permit carriers to impose a fixed monthly charge on residential customers to recover the costs of providing interstate telecommunications relay services.

(5) UNDUE BURDEN.—If the Commission finds that full compliance with the requirements of this section would unduly burden one or more common carriers, the Commission may extend the date for full compliance by such carrier for a period not to exceed 1 additional year.

(e) ENFORCEMENT.—

(1) IN GENERAL.—Subject to subsections (f) and (g), the Commission shall enforce this section.

(2) COMPLAINT.—The Commission shall resolve, by final order, a complaint alleging violation of this section within 180 days after the date such complaint is filed.

(f) CERTIFICATION.—

(1) STATE DOCUMENTATION.—Each State may submit documentation to the Commission that describes the program of such State for implementing intrastate telecommunications relay services.

(2) REQUIREMENTS FOR CERTIFICATION.—After review of such documentation, the Commission shall certify the State program if the Commission determines that the program makes available to hearing-impaired and speech-impaired individuals either directly, through designees, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such State in a manner that meets the requirements of regulations prescribed by the Commission under subsection (d).

(3) METHOD OF FUNDING.—Except as provided in subsection (d), the Commission shall not refuse to certify a State program based solely on the method such State will implement for funding intrastate telecommunication relay services.

(4) SUSPENSION OR REVOCATION OF CERTIFICATION.—The Commission may suspend or revoke such certification if, after notice and opportunity for hearing, the Commission determines that such certification is no longer warranted.

(g) COMPLAINT.—

(1) REFERRAL OF COMPLAINT.—If a complaint to the Commission alleges a violation of this section with respect to intrastate telecommunications relay services within a State and certification of the program of such State under subsection (f) is in effect, the Commission shall refer such complaint to such State.

(2) JURISDICTION OF COMMISSION.—After referring a complaint to a State under paragraph (1), the Commission shall exercise jurisdiction over such complaint only if—

(A) final action under such State program has not been taken on such complaint by such State—

(i) within 180 days after the complaint is filed with such State; or

(ii) within a shorter period as prescribed by the regulations of such State; or

(B) the Commission determines that such State program is no longer qualified for certification under subsection (f).

* * * * * * *

MINORITY VIEWS

I

On September 7, 1989, the Senate passed S. 933, the Americans with Disabilities Act, by the vote of 76–8. That bill, endorsed by President Bush, was essentially a product of negotiations between the Administration and the bill's proponents and constituted a complete rewrite of the original version of S. 933 as introduced on May 9, 1989. The major improvements in the bill, concerning employment requirements, can be summarized as follows:

ENFORCEMENT/DAMAGES

An unrestricted private cause of action with allowance for punitive and compensatory damages was eliminated. In lieu thereof, the enforcement procedures under Title VII of the 1964 Civil Rights Act were adopted. Under these procedures, a plantiff must first file a charge with the EEOC before, after receiving a right to sue letter, proceeding to Federal court. Relief is limited to lost backpay and benefits and injunctive relief; there is no provision for punitive and compensatory damages.

SCOPE

A phase-in of coverage was adopted. The first two years, employers with 25 or more employees will be covered; thereafter, those with 15 or more.

CONFUSING OVERLAP BETWEEN TITLE I (GENERAL PROHIBITION AGAINST DISCRIMINATION) AND TITLE II (EMPLOYMENT)

Title I of the bill was eliminated. All employer requirements are now contained in a new Title I.

ANTICIPATORY DISCRIMINATION

The language which would have allowed a plaintiff to sue if he or she believed that he or she was "about to be subjected to discrimination" was eliminated from the employment section.

II

On November 9 and 14, 1989, the House Education and Labor Committee considered the ADA. A substitute was offered and adopted at the markup which was comprised of the Senate-passed version of the bill and numerous changes negotiated prior to markup in both the employment and public accommodations sections. These improvements were as follows:

DRUGS

The substitute includes provisions that would clearly exclude current users of illegal drugs from protection under the ADA and under the Rehabilitation Act of 1973. An employer could act on the basis of a positive drug test and could administer such tests without fear of liability under the ADA.

CONTRACT LIABILITY

The substitute clarifies the extent of liability of a covered entity in contractual situations. Thus, a covered entity is only liable for discrimination against its own employees caused through a contract, not the effect of the contractor's action on other employees. This concept has also been clarified in the public accommodation title.

UNDUE HARDSHIP

The Committee added consideration of site specific factors when determining whether the provision of a reasonable accommodation represents an undue hardship. For example, if a grocery store that is part of a chain failed to reasonably accommodate an employee with a disability because the accommodation would constitute an undue hardship, a court could consider the financial resources of that store, and other store-based factors, as well as the financial resources of the chain, in determining whether the accommodation sought was an undue hardship. A similar principle was included in the public accommodation title under the provision, "readily achievable", the standard with which those engaged in public accommodations must comply in removing barriers.

The linkage between reasonable accommodation and undue hardship was also clarified so that any duty of reasonable accommodation is limited by the concept of undue hardship.

THRESHOLD ON ALTERATIONS

The substitute includes clarifications of when an alteration to a facility would require making the alteration accessible to and usable by those with disabilities.

DAMAGES

In the substitute a clarification was added concerning the Attorney General's authority to ask a court for monetary damages for an aggrieved party in a pattern and practice case under the public accommodation title. Such authority would not include punitive damages.

POTENTIAL PLACES OF EMPLOYMENT

Deleted the phrase and inserted "commercial facilities" to clarify that new construction, under the public accommodations title, must be accessible but not individual work stations.

GOOD FAITH

In the same type of pattern and practice case, the substitute would direct the court, when considering the good faith of the de-

fendant, to consider whether he or she could have reasonably anticipated the appropriate auxiliary aid to accommodate the unique needs of the individual or individuals with disabilities involved in the pattern and practice case.

COORDINATION AND TECHNICAL ASSISTANCE

To encourage coordination across agencies with responsibility to enforce the ADA, the Committee added a provision to require such agencies to develop procedures in implementing regulations to ensure that complaints are handled in a manner to avoid duplication and maximize consistency in interpretation of common terms in the ADA and the Rehabilitation Act. Also, the substitute requires agencies with enforcement authority to develop technical assistance manuals on the ADA to assist businesses in complying with the act. Such manuals must be developed within six months after the issuance of regulations for any title of the ADA.

REASONABLE GROUNDS

The substitute clarifies that when filing suits based on anticipatory claims under the public accommodations title, plaintiffs must have reasonable grounds to sue.

ATTORNEY GENERAL CERTIFICATION

Allows, but does not require, State and local governments to gain certification from the Department of Justice, that State or local codes, etc., meet the accessibility requirements of the Act. Such certification would create a rebuttable presumption of compliance.

QUALIFIED HISTORICAL PROPERTIES

Allows flexibility in applying requirements of the Act to qualified historical buildings when such requirements may threaten or destroy the historical significance of such buildings.

III

While these changes to the Senate bill were significant, individual Minority Members of the Committee offered further improving amendments at the Committee markup. For example, one amendment would have deleted the requirement that medical examinations can be given only upon demonstrating that such exams were consistent with business necessity; another would have limited relief under the public accommodations section of ADA to that provided under Title II of the 1964 Civil Rights Act (injunctive relief); a third postponed the effective date of the employment and public accommodation section until after final regulations would be issued; a fourth allowed for a tax credit for costs incurred by small business under the legislation; a fifth limited the scope of the "association" provision to relationships based on blood, marriage, or situations involving significant assistance; a sixth extended coverage of the legislation to Congress. Others were also offered. These amendments were defeated.

In sum, Americans with Disabilities Act has undergone, from the time of its introduction to its passage by the Committee, many

changes and many improvements. As such, it is a reasonable attempt to address a difficult social problem. Nevertheless, it is far from a perfect piece of legislation and the Minority Members of the Committee hope that an extensive Floor debate on the bill, allowing for full consideration of further improving amendments, will be allowed.

A final, important note. The Minority Members of this Committee supported this bill on the assumption that the agreement as struck in the Senate, as discussed above, with regard to remedies would be adhered to. That agreement, again, was to delete punitive and compensatory damages from the bill and to adopt current Title VII remedies of injunctive relief and lost backpay and benefits. Unfortunately, the legislation implemented this agreement through simply incorporating, by reference, the existing relevant provisions of Title VII. The Committee is now considering the Civil Rights Act of 1990, which among many other things, would amend Title VII remedies to included punitive and compensatory damages. These proposed changes to Title VII, in the view of the Minority Members, would thus, by fiat, undermine and reverse the underlying agreement which led to the passage of the ADA by the Senate. Employers, in short, are now facing the prospect of punitive and compensatory damages under a new statute imposing many novel requirements unfamiliar to most businesses in the private sector. This prospect threatens to undermine all support for this legislation and is the one issue which will result in complete opposition to the bill by the entire business community.

We strongly urge that the original agreement be adhered to and that an amendment be adopted on the House floor which would expressly adopt, in text, current Title VII remedies.

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TOM PETRI.
MARGE ROUKEMA.
STEVE GUNDERSON.
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